

# TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [REDACTED] 1926

No. [REDACTED] 180

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LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H.  
HAUSER, JOHN S. SCULLY, ET AL., ETC., APPELLANTS,

vs.

*Howard Sutherland*  
~~FREDERICK C. HICKS~~, AS ALIEN PROPERTY CUSTODIAN  
OF THE UNITED STATES; FRANK WHITE, AS TREAS-  
URER OF THE UNITED STATES, AND THE WIENER  
BANK-VEREIN OF VIENNA, AUSTRIA

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APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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FILED JULY 24, 1926

(31,351)





(31.351)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 628

LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H.  
HAUSER, JOHN S. SCULLY, ET AL., ETC., APPELLANTS,

vs.

FREDERICK C. HICKS, AS ALIEN PROPERTY CUSTODIAN  
OF THE UNITED STATES; FRANK WHITE, AS TREAS-  
URER OF THE UNITED STATES, AND THE WIENER  
BANK-VEREIN OF VIENNA, AUSTRIA

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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## Equity Subpoena.

1

*The President of the United States of America,  
to Thomas W. Miller, as Alien Property Custodian of the United States, and Frank White, as Treasurer of the United States, and the Wiener Bank-Verein, of Vienna, Austria,* GREETING :

YOU ARE HEREBY COMMANDED to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by Leopold Zimmermann, Louis J. Rees, Maryan H. Hauser, John S. Scully, Simon B. Blumenthal, David Forshay and Isaac Gutenstein, co-partners doing business under the firm name and style of Zimmermann & Forshay, as brokers, and to further do and receive what the said Court shall have considered in this behalf; and this you are not to omit under the penalty on you and each of you of Two hundred and fifty Dollars (\$250).

2

WITNESS, Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 28th day of February in the year One Thousand Nine Hundred and twenty-two, and of the Independence of the United States the One Hundred and Forty-sixth.

3

ALEX. GILCHRIST, JR.,  
Clerk.

STOCKTON & STOCKTON,  
Plaintiffs' Sol'rs.

*Equity Subpoena.*

4     The defendants are required to file their answer  
or other defense in the above cause in the Clerk's  
Office of this Court on or before the twentieth  
day after service hereof excluding the day of  
said service; otherwise the bill aforesaid may  
be taken *pro confesso*.

ALEX. GILCHRIST, JR.,  
Clerk.

(Seal.)

5

6

## Order for Service by Publication.

7

At a stated term of the United States District Court, held in and for the Southern District of New York, at the United States Courthouse in said district, on the 17th day of March, 1922.

Present—Honorable JULIAN W. MACK, *Circuit Judge*.

In Equity E. 23—160.

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LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H. HAUSER, JOHN S. SCULLY, SIMON B. BLUMENTHAL, DAVID FORSHAY and ISAAC GUTENSTEIN, co-partners doing business under the firm name and style of Zimmermann & Forshay, as brokers,

Plaintiffs,

—against—

THOMAS W. MILLER, as Alien Property Custodian of the United States, and FRANK WHITE, as Treasurer of the United States, and the WIENER BANK-VEREIN, of Vienna, Austria,

Defendants.

9

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Upon motion of the above named plaintiffs by their solicitors, Stockton & Stockton, and pursuant to Section 9 of the Trading with the Enemy Act, and Section 57 of the Judicial Code, and it appearing to the Court from the affidavit of Hamilton Vreeland, Jr., one of the solicitors for the plaintiffs, duly sworn to the 16th day of March, 1922, and submitted herewith, and from the original subpoena filed herein, that the

*Order for Service by Publication.*

- 10 Marshal of this court has duly returned the original subpoena issued in this suit with the following notation thereon:

"I hereby certify that after due and diligent search I am unable to find the within named defendants, Thomas W. Miller as Alien Property Custodian of U. S., Frank White as Treasurer of the United States and the Wiener Bank-Verein of Vienna, Austria, within the Southern District of New York.

- 11 WM. C. HECHT,  
U. S. Marshall,  
S. D. N. Y.

Dated, New York, March 1, 1922."

and that the defendant, the Wiener Bank-Verein of Vienna, Austria, is a foreign corporation and a non-resident alien and an "enemy," as defined by said Trading with the Enemy Act, personal service of the subpoena upon which defendant is not practicable, and which has not voluntarily appeared herein, it is,

- 12 ORDERED that the said defendant, the Wiener-Bank-Verein of Vienna, Austria, answer or otherwise move on or before the first day of June, 1922, as to the bill of complaint filed in the above entitled suit, or in default thereof that the Court will proceed to the hearing and adjudication of said suit; that this order be published in a newspaper of general circulation to wit: New York Evening Post once a week for six successive weeks, commencing on March 23, 1922, and that a copy of this order, together with a



*Affidavit of Hamilton Vreeland, Jr.*

copy of the bill of complaint filed herein, both  
duly certified as such by the Clerk of this court,  
be sent by registered mail to said defendant, the  
Wiener Bank-Verein at Vienna, Austria, on or  
before March 23, 1922. 13

A. G. Jr.

J. W. MACK,  
U. S. C. J.

**Affidavit of Hamilton Vreeland, Jr.**

UNITED STATES DISTRICT COURT, 14  
FOR THE SOUTHERN DISTRICT OF NEW YORK.

LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN  
H. HAUSER, JOHN S. SCULLY, SIMON B. BLU-  
MENTHAL, DAVID FORSHAY and ISAAC GUTEN-  
STEIN, co-partners doing business under the  
firm name and style of Zimmermann & For-  
shay, as brokers,

Plaintiffs,

—against—

THOMAS W. MILLER, as Alien Property Custodian  
of the United States, and FRANK WHITE, 15  
as Treasurer of the United States, and the  
WIENER BANK-VEREIN, of Vienna, Austria,  
Defendants.

State of New York,  
County of New York—ss.:

HAMILTON VREELAND, JR., being duly sworn  
says:

That he is a member of the firm of Stockton &

*Affidavit of Hamilton Vreeland, Jr.*

- 16 Stockton, the solicitors for the plaintiffs in the above entitled suit; that this action is brought to recover in United States Dollars, at the prevailing rate of exchange in the United States in or about the month of March, 1917, and from the property taken over by the Alien Property Custodian as belonging to the defendant the Wiener Bank-Verein, monies deposited with said defendant by plaintiffs and owing to plaintiffs by defendant; that on February 28th, 1922, he filed with the Clerk of the United States District Court for the Southern District of New York, the
- 17 original bill of complaint herein, thereupon obtaining from said Clerk a subpoena directing the above named defendants to appear before this Court to answer the bill of complaint herein; that on said February 28th 1922, he delivered to the United States Marshal for the Southern District of New York, the said subpoena to be served upon the above named defendants, and that said subpoena was returned by said Marshal with the following notation:

- 18 "I hereby certify that after due and diligent search I am unable to find the within named defendants, Thomas W. Miller as Alien Property Custodian of U. S., Frank White as Treasurer of the United States, and the Wiener Bank-Verein of Vienna, Austria, within the Southern District of New York.

WM. C. HECHT,  
U. S. Marshal,  
S. D. N. Y.

Dated, New York, March 1, 1922."

*Affidavit of Hamilton Vreeland, Jr.*

Deponent further states that he has been unable to discover within this district, any office of the defendant, the Wiener Bank-Verein, and that he is informed and believes that said defendant, the Wiener Bank-Verein is a foreign corporation organized under the laws of the former Empire of Austria-Hungary or the present Republic of Austria and is not doing business within this district. The sources of his information and the grounds of his belief are numerous letters and documents from said defendant to the plaintiffs herein, and conversations which deponent has had with various of plaintiffs who are familiar with said defendant and its operation in this country.

Deponent therefore prays that an order in form attached hereto be granted by this Honorable Court directing said defendant, the Wiener Bank-Verein to answer or otherwise move as to the Bill of Complaint filed in the above entitled suit.

(Sd.) HAMILTON VREELAND, JR.

Sworn to before me this  
16th day of March, 1922.

RITA OHLSEN,  
Notary Public,  
Kings Co. No. 117.  
Certificate filed Kings Co., Reg. Office No. 3060.  
Certificate filed New York County No. 165.  
Certificate filed N. Y. Register, No. 3127.  
Commission expires March 30th, 1923.  
(Seal)

### Copy of Order as Published.

22

(N. Y. Eve. Post, Mar. 23, 1922.)

AT A STATED TERM OF THE UNITED STATES DISTRICT COURT, held in and for the Southern District of New York, at the United States Courthouse in said district, on the 17th day of March, 1922.

Present: HONORABLE JULIAN W. MACK, Circuit Judge.

23

LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H. HAUSER, JOHN S. SCULLY, SIMON B. BLUMENTHAL, DAVID FORSHAY and ISAAC GUTENSTEIN, co-partners doing business under the firm name and style of ZIMMERMANN and FORSHAY, as brokers, Plaintiffs, against THOMAS W. MILLER, as Alien Property Custodian of the United States, and FRANK WHITE, as Treasurer of the United States, and the WIENER BANK-VEREIN of Vienna, Austria, Defendants.—In Equity.—E. 23-160.

24

Upon motion of the above named plaintiffs by their solicitors, Stockton & Stockton, and pursuant to Section 9 of the Trading with the Enemy Act, and Section 57 of the Judicial Code, and it appearing to the court from the affidavit of Hamilton Vreeland, Jr., one of the solicitors for the plaintiffs, duly sworn to the 16th day of March, 1922, and submitted herewith, and from the original subpoena filed herein, that the Marshal of this court has duly returned the original subpoena issued in this suit with the following notation thereon:

"I hereby certify that after due and diligent search I am unable to find the within named

*Copy of Order as Published.*

defendants, Thomas W. Miller as Alien Prop- 25  
erty Custodian of U. S., Frank White as Treas-  
urer of the United States and the Wiener Bank-  
Verein of Vienna, Austria, within the Southern  
District of New York.

“WM C. HECHT,  
“U. S. Marshal, S. D. N. Y.

“Dated, New York, March 1, 1922.”

and that the defendant, the Wiener Bank-Verein 26  
of Vienna, Austria, is a foreign corporation and  
a non-resident alien and an “enemy,” as defined  
by said Trading with the Enemy Act, personal  
service of the subpoena upon which defendant is  
not practicable, and which has not voluntarily  
appeared herein, it is

ORDERED that the said defendant, the Wiener 27  
Bank-Verein of Vienna, Austria, answer or other-  
wise move on or before the first day of June,  
1922, as to the bill of complaint filed in the  
above entitled suit, or in default thereof that the  
court will proceed to the hearing and adjudica-  
tion of said suit; that this order be published  
in a newspaper of general circulation to wit: New  
York Evening Post, once a week for six succes-  
sive weeks, commencing on March 23, 1922, and  
that a copy of this order, together with a copy  
of the bill of complaint filed herein, both duly  
certified as such by the Clerk of this court, be  
sent by Registered mail to said defendant, the  
Wiener Bank-Verein at Vienna, Austria, on or

J. W. MACK, U. S. C. J.  
before March 23, 1922.

*Affidavit of Publishing of A. McMillan.*

28 State of New York,  
City and County of New York—ss.:

A. McMILLAN, being duly sworn, says that he is the Principal Clerk of the Publisher of "The Evening Post," a daily newspaper printed and published in the City and County of New York; that the notice hereto annexed has been regularly published in said "The Evening Post" once a week for six successive weeks commencing on the 23rd day of March, 1922.

29 (Sd.) A. McMILLAN.

Sworn to before me this  
27th day of April, 1922.

(Sd.) JAMES W. JENNINGS,  
Notary Public,  
New York County.

Clerk's No. 51; Register's No. 3041.

Certificate filed in Counties of Kings Co. Clerk's  
No. 11; Reg. No. 3054.

Bronx Co. Clerk's No. 4; Reg. No. 9.

Commission expires March 30, 1923.

30 (Seal)

(Filed May 1, 1922.)



**Affidavit of Mailing of Edward R.  
Whittingham.**

31

**UNITED STATES DISTRICT COURT,  
FOR THE SOUTHERN DISTRICT OF NEW YORK.  
In Equity—E23-160.**

---

**LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H.  
HAUSER, JOHN S. SCULLY, SIMON B. BLUMEN-  
THAL, DAVID FORSHAY and ISAAC GUTENSTEIN,  
co-partners doing business under the firm  
name and style of Zimmermann & Forshay, as  
brokers,**

**Plaintiffs,**

32

**—against—**

**THOMAS W. MILLER, as Alien Property Custodian  
of the United States, and FRANK WHITE, as  
Treasurer of the United States, and the  
WIENER BANK-VEREIN, of Vienna, Austria,  
Defendants.**

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**United States of America,  
Southern District of New York,  
County and State of New York—ss.:**

**EDWARD R. WHITTINGHAM, being duly sworn,**  
says that he is an attorney-at-law in the office and  
employ of Stockton & Stockton, the solicitors for  
the above named plaintiffs; that he is over the  
age of 21 years and resides at No. 39 East Tenth  
Street in the City of New York; that pursuant  
to an order of Mr. Justice Mack dated the 17th  
day of March, 1922, and filed herein, he sent by  
registered mail on the 21st day of March, 1922,  
a copy of said order, together with a copy of the  
bill of complaint filed herein on the 28th day of  
February, 1922, both duly certified as such by the

33

*Affidavit of Mailing of Edward R. Whittingham.*

- 34 Clerk of this Court, to the defendant the Wiener Bank-Verein of Vienna, Austria, by depositing said certified copies in the United States mail at the branch post office known as "City Hall Station" Broadway and Park Row, Borough of Manhattan, City of New York, the same being one of the regularly maintained branch post offices of the United States, registered and enclosed in a securely sealed and closed wrapper, with postage thereon prepaid, addressed to said defendant the Wiener Bank-Verein at Vienna, Austria, that being the address designated in said order.

35

EDWARD R. WHITTINGHAM.

Sworn to before me this  
22nd day of March, 1922.

RITA OHLSEN,  
Notary Public,  
Kings Co. No. 117.

Certificate filed Kings Co. Register's Office No.  
3060.

Certificate filed New York County No. 165.

Certificate filed N. Y. Register, No. 3127.

36

Commission expires March 30th, 1923.

## Bill of Complaint.

37

UNITED STATES DISTRICT COURT,  
FOR THE SOUTHERN DISTRICT OF NEW YORK.  
In Equity—E23-160.

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LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H.  
HAUSER, JOHN S. SCULLY, SIMON B. BLUMEN-  
THAL, DAVID FORSHAY and ISAAC GUTENSTEIN,  
co-partners doing business under the firm  
name and style of Zimmermann & Forshay, as  
brokers,

Plaintiffs,

38

—against—

THOMAS W. MILLER, as Alien Property Custodian  
of the United States, and FRANK WHITE, as  
Treasurer of the United States, and the  
WIENER BANK-VEREIN, of Vienna, Austria,  
Defendants.

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The plaintiffs above named respectfully show  
to the Court and allege:

1. That at all times hereinafter mentioned, the  
plaintiffs herein were, and now are, co-partners  
doing business in the City of New York within  
the Southern District of New York, under the  
firm name and style of Zimmermann & Forshay,  
as brokers; that the plaintiffs were at all times  
hereinafter mentioned, and still are, residents and  
citizens of the State of New York; that all of said  
plaintiffs reside within the Southern District of  
New York, except plaintiffs David Forshay and  
John S. Scully, and that said David Forshay and  
John S. Scully each reside within the Eastern

39

*Bill of Complaint.*

40 District of New York; and that all said plaintiffs are now and at all times hereinafter mentioned were citizens of the United States of America, and are more than twenty-one years of age.

2. That the defendant, Thomas W. Miller, is now, and since in or about March, 1921, has been the duly appointed, qualified and acting Alien Property Custodian of the United States; that the defendant, Frank White, is now and since in or about March, 1921, has been the duly appointed, qualified and acting Treasurer of the United States; and that the defendant the Wiener Bank-Verein of Vienna, Austria, is now, and at all times hereinafter mentioned was, a corporation organized and existing under and by virtue of the laws of the former Empire of Austria-Hungary and/or the present Republic of Austria.

3. That this is a suit in equity brought under the provisions of the Trading with the Enemy Act, approved October 6, 1917, and the amendments thereto, and that this Honorable Court has jurisdiction of this suit by reason of said act.

42 4. That at the time of the commencement of this suit eighteen months had not elapsed after the "end of the war" as defined in said act.

5. That heretofore certain property was conveyed, transferred, assigned, delivered or paid to the then Alien Property Custodian, or seized by him and held by him or by the then Treasurer of the United States on the ground that it was the property of the Wiener Bank-Verein of Vienna, in the Empire of Austria-Hungary or the Republic of Austria, and on the further ground that the

*Bill of Complaint.*

said Wiener Bank-Verein of Vienna was an "enemy" or "ally of enemy" within the meaning of the terms as defined in said Trading with the Enemy Act and the amendments thereto; that since the time aforesaid all of said property, or the proceeds of the sale of all or any part thereof, has remained in the possession, custody, or control of the Alien Property Custodian and/or the Treasurer of the United States; that all of said property, or the proceeds of the sale of all or any part thereof, is now in the possession, custody or control of the above named defendant, the Alien Property Custodian and the Treasurer of the United States or each or either of them; and that the Alien Property Custodian and/or the Treasurer of the United States have received various sums of money as income from said property or from the proceeds of the sale of all or any part thereof.

6. That at no time since April 6, 1917, has any of plaintiffs been resident within the territory, including that occupied by the military and naval forces, of any nation with which the United States was at war, or of any nation which was an ally of a nation with which the United States was at war, or been resident outside the United States and doing business within such territory, or been an officer, official, agent, or agency of any such enemy or ally of enemy nation.

7. That none of plaintiffs is now or ever has been an "enemy" or "ally of enemy" within the meaning of the terms as defined by said Trading with the Enemy Act and the amendments thereto and the Proclamations of the President of the United States issued in pursuance thereof.

*Bill of Complaint.*

- 46 8. That said defendant, the Wiener Bank-Verein of Vienna, prior to October 6, 1917, namely on or about April 6, 1917, had in its possession the sum of Three million three hundred thirteen thousand seven hundred ninety-nine & 03/100 kronen (3,313,799.03 kronen), which it held for the use and benefit of plaintiffs and in which the defendant, the Wiener Bank-Verein of Vienna, then had and now has no right, title or interest; that said sum of money was due and owing to plaintiffs from the defendant, the Wiener Bank-Verein of Vienna, prior to October 6, 1917, namely
- 47 on April 6, 1917, and is now due and owing to said plaintiffs, at the average cable transfer rate of exchange for United States dollars and Austrian kronen prevailing in the United States in or about the months of March and April, 1917, that is, at the rate of 11.80 cents in United States currency for each Austrian krone, namely Three hundred ninety-one thousand twenty-eight dollars and Twenty-nine cents (\$391,028.29), which said sum the defendant, the Wiener Bank-Verein of Vienna, retains and, although demanded, refuses to pay.
- 48 9. That on or about the 15th day of December, 1921, and subsequent to said seizure or taking over by the Alien Property Custodian of said property, plaintiffs duly filed with the Alien Property Custodian a notice of their claim on said debt under oath and in such form and containing such particulars as the said Custodian required, and have not filed an application to the President of the United States for the allowance of said claim, all in pursuance of the provisions of the Trading with the Enemy Act and the amendments thereto.



*Bill of Complaint.*

10. That said property is subject to the jurisdiction of this Court and to any decree or judgment which may be rendered herein. 49

WHEREFORE your plaintiffs pray that the above mentioned defendants and each or any of them be directed and ordered to pay to the plaintiffs the sum of Three hundred ninety-one thousand twenty-eight dollars and Twenty-nine cents (\$391,028.29) with interest thereon at the rate of six per centum per annum from the 6th day of April, 1917, out of the property conveyed, transferred, assigned, delivered or paid to the then Alien Property Custodian or seized by him and held by him or by the then Treasurer of the United States as aforesaid and now in the possession, custody or control of the above named defendants, the Alien Property Custodian and the Treasurer of the United States or each or either of them as aforesaid, or out of the proceeds of the sale of any or all of said property, or out of any increase, income, interest, dividends, coupons, or profits, which shall have accrued or arisen from or upon said property or said proceeds of sale up to the time of said payment to the plaintiffs, and that your plaintiffs have such other and further relief as to the Court may seem just and proper. 50 51

STOCKTON & STOCKTON,

Solicitors for Plaintiffs,

Office and Post Office Address,

2 Rector Street,

Borough of Manhattan,

City of New York.

*Bill of Complaint.*

52

State of New York,  
County of New York—ss.:

MARYAN H. HAUSER, being duly sworn says:

53

That he is a member of the firm of Zimmermann & Forshay, the plaintiffs in the foregoing Bill of Complaint; that the plaintiffs are co-partners pleading together and that he is authorized to make verification on behalf of his co-partners as well as on behalf of himself; and that he has read the foregoing Bill of Complaint and knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

MARYAN H. HAUSER.

Sworn to before me this  
10th day of February, 1922.

ELIAS GOLDSCHMIDT,  
Notary Public.

54

Bronx County Clerk's No. 59.  
Bronx County Register's No. 59.  
New York County Clerk's No. 255.  
New York County Reg. No. 3234.  
Commission expires March 30, 1923.

# **Stipulation Amending Complaint.**

55

UNITED STATES DISTRICT COURT,  
FOR THE SOUTHERN DISTRICT OF NEW YORK.

In Equity—E23-160.

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LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H. HAUSER, JOHN S. SCULLY, SIMON B. BLUMEN-  
THAL, DAVID FORSHAY and ISAAC GUTENSTEIN,  
co-partners doing business under the firm  
name and style of Zimmermann & Forshay, as  
brokers,

Plaintiffs,

—against—

56

THOMAS W. MILLER, as Alien Property Custodian  
of the United States, and FRANK WHITE, as  
Treasurer of the United States, and the  
WIENER BANK-VEREIN, of Vienna, Austria,  
Defendants.

---

IT IS HEREBY STIPULATED AND AGREED by and be-  
tween the undersigned that the Bill of Complaint  
herein be and the same hereby is amended:

1. By the insertion of the following paragraph  
in place of paragraph 8 of the original Bill of  
Complaint.

57

"8. That said defendant, the Wiener  
Bank-Verein of Vienna, prior to October  
6, 1917, namely on or about April 6, 1917,  
was indebted to the plaintiffs in the sum of  
Two million, sixty-three thousand, seven  
hundred ninety-nine and three one-hun-  
dredths Kronen (2,063,799.03 Kronen);  
that said sum of money was due and owing

*Stipulation Amending Complaint.*

58

to plaintiffs from the defendant, the Wiener Bank-Verein of Vienna, prior to October 6, 1917, namely on April 6, 1917; and that it is now due and owing to said plaintiffs, at the average cable transfer rate of exchange for United States dollars and Austrian kronen prevailing in the United States in or about the months of March and April, 1917, that is, at the rate of 11.80 cents in United States currency for each Austrian krone, namely two hundred forty-three thousand, five hundred twenty-eight dollars and twenty-nine cents (\$243,528.29), which said sum the defendant, the Wiener Bank-Verein of Vienna, retains, and although demanded, refuses to pay."

59

2. By the insertion of the following paragraph in place of the last paragraph of the original Bill of Complaint.

60

"WHEREFORE your plaintiffs pray that the above mentioned defendants and each or any of them be directed and ordered to pay to the plaintiffs the sum of Two hundred forty-three thousand, five hundred twenty-eight dollars and Twenty-nine cents (\$243,528.29) with interest thereon at the rate of five per centum per annum from the 6th day of April, 1917, out of the property conveyed, transferred, assigned, delivered or paid to the then Alien Property Custodian or seized by him and held by him or by the then Treasurer of the United States as aforesaid and now in the possession, custody or control of the above named defendants, the Alien Property Custodian and the Treas-

*Stipulation Amending Complaint.*

urer of the United States or each or either  
 of them as aforesaid, or out of the proceeds  
 of the sale of any or all of said property,  
 or out of any increase, income, interest,  
 dividends, coupons, or profits, which shall  
 have accrued or arisen from or upon said  
 property or said proceeds of sale up to the  
 time of said payment to the plaintiffs, and  
 that your plaintiffs have such other and  
 further relief as to the Court may seem  
 just and proper,"

61

and it is

62

FURTHER STIPULATED AND AGREED that an order  
 may be entered herein without further notice to  
 any party.

Dated, New York, March 23rd, 1923.

STOCKTON & STOCKTON,  
 Solicitors for Plaintiffs.

WM. HAYWARD,  
 United States Attorney, Solicitor for Defendants,  
 Thomas W. Miller, as Alien Property Custodian,  
 and Frank White, as Treasurer of the United  
 States.

63

(sd) MANHEIM & WACHTELL,  
 Solicitors for Defendant,  
 Wiener Bank-Verein of Vienna, Austria.

So Ordered:

(sd) ALEX GILCHRIST, JR.,  
 U. S. D. J., Clerk.

**Answer of Defendants Miller and White.**

64

IN THE  
UNITED STATES DISTRICT COURT,  
FOR THE SOUTHERN DISTRICT OF NEW YORK.  
In Equity—E23-160.

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LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H.  
HAUSER, JOHN S. SCULLY, SIMON B. BLUMEN-  
THAL, DAVID FORSHAY and ISAAC GUTENSTEIN,  
co-partners doing business under the firm  
name and style of Zimmermann & Forshay, as  
brokers,

65

Plaintiffs,

—against—

THOMAS W. MULLER, as Alien Property Custodian,  
FRANK WHITE, as Treasurer of the United  
States, and the WIENER BANK-VEREIN, of  
Vienna, Austria,

Defendants.

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Now come the defendants, Thomas W. Miller, as  
Alien Property Custodian, and Frank White, as  
Treasurer of the United States, separately and  
severally answering the bill of complaint, and  
for their separate and several answers say:

66

(1) They have no knowledge or information suf-  
ficient to form a belief with respect to the aver-  
ments of paragraph numbered 1 of the bill of  
complaint, and therefore demand strict proof  
thereof;

(2) These defendants admit the averments of  
paragraph numbered 2 of the bill of complaint,  
except in so far as the said averments allege that  
the defendant, the Wiener Bank-Verein, of Vienna

*Answer of Defendants Miller and White.*

Austria, is now and at all times hereinafter mentioned, was a corporation organized and existing under and by virtue of the laws of the former Empire of Austria-Hungary, and/or the present Republic of Austria, and as to the said averments these defendants say that they have no knowledge or information sufficient to form a belief with respect thereto, and therefore demand strict proof thereof; 67

(3) The averments of paragraph numbered 3 of the bill of complaint are conclusions of law which these defendants are not required to answer;

(4) They admit the averments of paragraph numbered 4 of the bill of complaint; 68

(5) Answering the averments of paragraph numbered 5 of the bill of complaint these defendants say that the Alien Property Custodian, acting under and pursuant to the terms and provisions of the Trading with the Enemy Act, the amendments thereto and the proclamations and executive orders issued thereunder, after investigation, determined that the Wiener Bank-Verein, of Vienna, Austria, was an enemy within the purview and meaning of the said Act, the amendments thereto and the proclamations and executive orders issued thereunder, and that certain money and other property was owing or belonging to, held for, by, on account of, and for the benefit of the said enemy. Thereupon the Alien Property Custodian required that the said money and other property be conveyed, transferred, assigned, delivered, and/or paid to him, to be by him held, administered and accounted for as provided by law, and compliance with the said demand was accomplished. 69  
The Alien Property Custodian thereafter acting

*Answer of Defendants Miller and White.*

70 pursuant to law, paid into the Treasury of the United States a large amount of money received as aforesaid, and the Alien Property Custodian and the Treasurer of the United States now hold all the money and other property so received.

Further answering said paragraph these defendants say that the determination of the Alien Property Custodian as aforesaid is not final for the purposes of this suit, and the plaintiffs herein must submit proof as to the ownership of the said money and other property, and this court must determine out of what, if any, of the said money and other property any claim which the  
71 plaintiffs herein may establish must be paid;

(6-7-8) They have no knowledge or information sufficient to form a belief with respect to the averments of paragraphs numbered 6, 7 and 8, of the bill of complaint, and therefore demand strict proof thereof;

(9) They admit the averments of paragraph numbered 9 of the bill of complaint;

(10) They say that the averments of paragraph numbered 10 of the bill of complaint are immaterial to the purposes of this suit, and these defendants are not required to answer the same.  
72

WHEREFORE, these defendants, having fully answered the bill of complaint, pray that they be dismissed with their costs in this behalf expended, and for such other and further relief to which in the premises they may be justly entitled.

WM. HAYWARD,

United States Attorney,

Solicitor for Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States.



**Amendment to Answer of Defendants  
Miller and White.**

73

IN THE  
UNITED STATES DISTRICT COURT,  
FOR THE SOUTHERN DISTRICT OF NEW YORK.  
Equity No. 23-160.

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LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN  
H. HAUSER, JOHN S. SCULLY, SIMON B. BLU-  
MENTHAL, DAVID FORSHAY and ISAAC GUTEN-  
STEIN, co-partners doing business under the  
firm name and style of Zimmermann & For-  
shay, as brokers,

74

Plaintiffs,

—against—

THOMAS W. MILLER, as Alien Property Custodian,  
FRANK WHITE, as Treasurer of the United  
States, and the WIENER BANK-VEREIN, of  
Vienna, Austria,

Defendants.

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Now come the defendants, Thomas W. Miller,  
as Alien Property Custodian, and Frank White,  
as Treasurer of the United States, and by leave  
of Court heretofore granted, amend paragraph  
numbered 5 of their answer by adding thereto  
the following paragraph:

75

That there are now pending certain suits  
against the Alien Property Custodian to collect  
out of funds in the hands of the Alien Property  
Custodian certain claims. The titles of the said

*Amendment to Answer of Miller and White.*

- 76 suits, together with the venues and the amounts claimed are as follows:

Alston Tobacco Company, Inc. v. Alien Property Custodian, Treasurer of the United States, and Wiener Bank-Verein of Vienna, Austria (Southern District of New York). \$214,000.

Equitable Trust Company of New York v. Alien Property Custodian, Treasurer of the United States, and Wiener Bank-Verein of Vienna, Austria.

- 77 All of the said cases are now pending and undetermined.

WM. HAYWARD,  
United States Attorney,  
Solicitor for Thomas W. Miller, as  
Alien Property Custodian, and  
Frank White, as Treasurer of the  
United States.

**Notice of Appearance of Defendant Bank.**

79

UNITED STATES DISTRICT COURT,  
FOR THE SOUTHERN DISTRICT OF NEW YORK.  
In Equity E. 23-160.

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LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN  
H. HAUSER, JOHN S. SCULLY, SIMON B. BLU-  
MENTHAL, DAVID FORSHAY and ISAAC GUTEN-  
STEIN, co-partners doing business under the  
firm name and style of Zimmermann & For-  
shay, as brokers,

Plaintiffs,

80

—against—

THOMAS W. MILLER, as Alien Property Custodian  
of the United States, and FRANK WHITE,  
as Treasurer of the United States, and the  
WIENER BANK-VEREIN, of Vienna, Austria,  
Defendants.

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*Sirs:*

PLEASE TAKE NOTICE that the defendant, Wiener  
Bank-Verein, appears in this action, and that we  
are retained as attorneys for it herein, and de-  
mand that a copy of the complaint and all other  
papers be served on us, at our office and post  
office address as stated below.

81

Dated, New York, June 12th, 1922.

Yours, etc.,

MANHEIM & WACHTELL, Esqs.,  
Attorneys for Defendant,  
Wiener Bank-Verein,  
Office & P. O. Address,  
1328 Broadway,  
Borough of Manhattan,  
City of New York.

*Answer of Defendant Bank.*

82 To:

STOCKTON & STOCKTON, Esqs.,  
2 Rector St.,  
New York City.

**Answer of Defendant Bank.**

UNITED STATES DISTRICT COURT,  
FOR THE SOUTHERN DISTRICT OF NEW YORK.  
In Equity E23-160.

83 LEOPOLD ZIMMERMAN, LOUIS J. REES, MARYAN  
H. HAUSER, JOHN S. SCULLY, SIMON B. BLU-  
MENTHAL, DAVID FORSHAY and ISAAC GUTEN-  
STEIN, co-partners doing business under the  
firm name and style of Zimmermann & For-  
shay, as brokers,

Plaintiffs,

—against—

THOMAS W. MILLER, as Alien Property Custodian  
of the United States, and FRANK WHITE, as  
Treasurer of the United States, and the  
WIENER BANK-VEREIN, of Vienna, Austria,  
Defendants.

84 Now comes the defendant, Wiener Bank-  
Verein, and for its answer to the bill of com-  
plaint herein, alleges upon information and  
belief:

I. It admits the allegations contained in para-  
graphs marked "I," "II," "III," "IV," "VI" and  
"VII" of the bill of complaint.

II. This defendant admits that the Alien  
Property Custodian, appointed by the President

*Answer of Defendant Bank.*

of the United States, received certain funds, securities and other property which this defendant had on deposit or within the custody of various banks within the United States, such funds, securities and other property being so held within the United States by this defendant for its own account and for the account of divers customers and correspondents of this City, and that such funds, securities and other property are now in the possession of and held by the defendant, Thomas W. Miller, as Alien Property Custodian, and/or Frank White, as Treasurer of the United States, and that the said Alien Property Custodian made a finding that this defendant was an enemy or ally of enemy within the meaning of these terms, as defined in the Trading with the Enemy Act, approved October 6th, 1917; and it denies each and every allegation contained in paragraph marked "V" of the said bill of complaint. 85 86

III. This defendant admits that on or about April 6th, 1917, the plaintiffs had on deposit with this defendant, a kronen balance amounting to 3,313,799.03 kronen, which this defendant held subject to the orders for the disposal thereof, to be sent from time to time by the plaintiffs, and this defendant denies each and every other allegation contained in paragraph marked "VIII" of the bill of complaint. 87

IV. This defendant denies that it has any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs marked "IX" and "X" of the bill of complaint, and demands strict proof thereof.

*Answer of Defendant Bank.*

88       FOR A FIRST DEFENSE HEREIN, THIS DEFENDANT  
ALLEGES:

V. That this defendant is a banking corporation duly organized under the laws of the Empire of Austro-Hungary, prior to April 6th, 1917, with its principal office at the City of Vienna, Austria, and that the deposits aggregating the sum of 3,313,799.03 kronen were made by the plaintiffs with this defendant, pursuant to an agreement and understanding between them, by which it was mutually agreed and understood among other things, that the relations and mutual rights and obligations arising between the plaintiffs and this defendant, shall be governed by and shall be subject to the laws of Austria.

89       VI. That at the time the said agreement and understanding were made and during the time that the deposits of the kronen as alleged in the bill of complaint were made with this defendant, it was provided by the terms of section 1425 of the General Civil Law of Austria, substantially as follows:

90       "Where a debt cannot be paid because the creditor is unknown, absent or refuses to accept payment, or because of other important reasons, the debtor must deposit the subject matter of the debt in Court. Such action when done according to law and notice thereof is given to the creditor, discharges the debtor from his obligations and puts upon the creditors all risks respecting the subject matter of the debt."

VII. This defendant further alleges that the General Civil Law Code was at that time and is now a system of Statute Law enacted by the duly

*Answer of Defendant Bank.*

appointed legislative authority of Austria, and that at all the times mentioned in the bill of complaint and in this answer, such body of Statute Law was the law of Austria. 91

VIII. That subsequent to the said 6th day of April, 1917, and prior to the commencement of this suit, and owing to the absence of these plaintiffs, and owing to the refusal of these plaintiffs to accept the payment of their balance of the kronen account hereinbefore named, and owing to the plaintiff's expressed intention to refuse such payment, should same be tendered at the then prevailing rate of exchange, this defendant deposited the balance of these plaintiffs' kronen account with this defendant, with the Local Law Court designated for that purpose, pursuant to the terms of Section 1425 of the General Civil Law Code hereinbefore referred to, and duly gave written notice of such deposit to these plaintiffs. 92

IX. That by reason of the mutual agreement and understanding between the plaintiffs and this defendant, this defendant became entirely and duly released and discharged from the claim and cause of action alleged in the bill of complaint herein. 93

FOR A SECOND DEFENSE, THIS DEFENDANT FURTHER ALLEGES:

X. That at or about the times set forth in the bill of complaint, the plaintiffs accepted a large number of orders from their customers in the United States, to purchase for such customers various sums or amounts of kronen in Austria, and that for the purpose of enabling

*Answer of Defendant Bank.*

- 94 them to execute the orders so obtained by it for the purchase and delivery of kronen to certain designated persons or corporations in Austria, these plaintiffs established a kronen account with this defendant, with the purpose and intention, and with the agreement and understanding between the plaintiffs and this defendant that at all times, the said kronen account on deposit with this defendant should be applied in the execution of orders for the purchase of kronen received by the plaintiffs from their customers and transmitted to this defendant, such orders
- 95 to be evidenced either by cable transfers, wireless or otherwise, or by written orders, drafts or checks delivered by the plaintiffs to their customers, who became purchasers of kronen as aforesaid, and that this defendant was required to pay such kronen account in kronen, and not in any other currency or by any other means, and this defendant further alleges that this system of International money transfers has been established by International banking usage and custom, and that this International banking usage and custom was well known to the plaintiffs as well as to the defendant, and that the relations
- 96 of the plaintiffs and this defendant and their mutual rights and obligations were established with reference to such International banking usage and custom, and that the plaintiffs, in making settlements with their customers for the return or refund of such kronen purchases for their behalf by the plaintiffs, have been made and are making such settlement on the basis of the prevailing rate of kronen exchange at the time of the return or refund, and not at the average cable rate mentioned in paragraph



*Answer of Defendant Bank.*

"VIII" of the bill of complaint, and that by reason of the premises, the kronen balance deposited with this defendant, if repayable to the plaintiffs at all, is repayable in kronen, and not at the cable rate set forth in paragraph "VIII" of the bill of complaint; and in converting such kronen into American dollars, the plaintiffs, if entitled to recover at all, are entitled to recover only at the rate of exchange prevailing between kronen and dollars at the date of the rendition of the judgment; and this defendant further alleges that if these plaintiffs should be permitted to recover at any other than the prevailing rate of exchange between kronen and dollars at the time of the rendition of a judgment, if any herein, they would be unjustly enriched, and this defendant would suffer an unfair, unjust and inequitable hardship. 97 98

WHEREFORE, this defendant prays that upon a final hearing of this cause, it be ordered and decreed that the bill of complaint of the plaintiff herein be dismissed on the merits, upon the ground of the payment to the Local Law Court of the number of kronen held by this defendant as a general deposit for the plaintiffs, and in the alternative, that the plaintiffs receive a judgment against this defendant for the sum of 3,313,799.03 kronen, expressed in American dollars, at the rate of exchange prevailing on the date of the rendition of the judgment, with appropriate costs of the action. 99

MANHEIM & WACHTELL,

Attorneys for Defendant,

Wiener Bank-Verein,

1328 Broadway,

New York City,

Manhattan Borough.

*Answer of Defendant Bank.*

100 State of New York,  
City and County of New York—ss. :

SAMUEL R. WACHTELL, being duly sworn, deposes and says :

I am an attorney and counselor at law, and a member of the firm of Manheim & Wachtell, attorneys for the defendant, Wiener Bank-Verein, herein.

101 I have read the foregoing answer and know the contents thereof, and the same is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters, I believe the same to be true.

The source of my information and the grounds of my belief are various written communications in my possession, sent to me by the defendant and the defendant's agents, and personal conversations had by me with one of the managing directors of the defendant.

102 The reason that this verification is made by deponent and not by the defendant is because this defendant is not in the United States, but is a foreign corporation having its principal office in the City of Vienna, Austria, and this deponent is its duly authorized agent for the purpose of appearing in and defending this action.

SAMUEL R. WACHTELL.

Sworn to before me this  
23rd day of March, 1923.

DINAH HOROWITZ,  
Commissioner of Deeds,  
N. Y. City.

**Stipulation of Facts and Amending  
Pleadings.**

103

UNITED STATES DISTRICT COURT,  
FOR THE SOUTHERN DISTRICT OF NEW YORK.

In Equity E. 23-160.

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LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN  
H. HAUSER, JOHN S. SCULLY, SIMON B. BLU-  
MENTHAL, DAVID FORSHAY and ISAAC GUTEN-  
STEIN, co-partners doing business under the  
firm name and style of Zimmermann & For-  
shay, as brokers,

Plaintiffs,

104

—against—

THOMAS W. MILLER, as Alien Property Custodian  
of the United States, and FRANK WHITE,  
as Treasurer of the United States, and the  
WIENER BANK-VEREIN, of Vienna, Austria,  
Defendants.

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The solicitors for the plaintiffs and the defend-  
ant, Wiener Bank-Verein, of Vienna, Austria,  
hereby stipulate for the purposes of the above en-  
titled action only.

105

1. The defendant, Wiener Bank-Verein, is a  
foreign corporation engaged in the business of  
banking. It was organized under the laws of the  
Empire of Austria-Hungary, and received its cor-  
porate charter from the duly constituted Govern-  
mental Department under that Empire empowered  
to issue the same. It has continued its corporate  
existence unchanged during the changes in the  
Government of Austria occurring during and

*Stipulation of Facts and Amending Pleadings.*

106 after the war and its charter has been continued and validated by the present Austrian Government. Its principal place of business is in Vienna, Austria. It has no branch office in the United States of America.

2. For a number of years preceding the outbreak of the war between the United States and Austria, plaintiffs maintained a bank account in kronen with the defendant, the Wiener Bank-Verein, in which the plaintiffs from time to time made deposits in kronen for the purpose of providing payment of drafts and orders issued and transmitted by the plaintiffs by letter, cable, wireless or otherwise, and drawn on and payable at the defendant, Wiener Bank-Verein, at Vienna.

3. During the period that the plaintiffs maintained the bank account with the defendant, the Wiener Bank-Verein, the latter sent to the plaintiffs and the plaintiffs received periodic and regular statements of account at least once in three months, such statements of account being rendered on a printed sheet identical with the facsimile annexed to this stipulation and marked Exhibit A, with the exception of the blanks shown on the said facsimile, which blanks were filled out in each statement of account in accordance with the facts shown on such statement.

4. Prior to the time when the plaintiffs opened their kronen account with the defendant, Wiener Bank-Verein, the General Civil Law Code of Austria was and now is a system of statute law enacted by the duly erected legislative authority of Austria, and at all such times the said

*Stipulation of Facts and Amending Pleadings.*

General Civil Law contained and now contains a section known as section 1425, which reads as follows: 109

"If a debt cannot be paid because the creditor is unknown, absent, or dissatisfied with the offer, or because of other important reasons, the debtor may deposit in court the subject matter in dispute; or, if it is not susceptible of such action he may take legal steps for its custody. If legally carried out and the creditor has been informed thereof, either of these measures discharges the debtor of his obligation, and places the subject matter delivered at the risk of the creditor." 110

5. After July 14th, 1919, and prior to the first day of April, 1920, plaintiffs refused to accept the kronen on general deposit with defendant bank as offered by said defendant either in kind or in United States currency at the rate of exchange then prevailing, but demanded the amount of said kronen on deposit as of April 6, 1917, at the average cable transfer rate of exchange between United States dollars and Austrian kronen prevailing in the United States during the month immediately preceding the outbreak of war between the United States and Austria Hungary, namely, 11.80 United States cents for each Austrian krone. 111

6. On or about the 1st day of April, 1920, the defendant, the Wiener Bank-Verein, deposited in the Circuit Court for the Interior at Vienna, in part 6 thereof, the number of kronen in its bank

*Stipulation of Facts and Amending Pleadings.*

112 stated to be due and owing to the plaintiffs as of April 6, 1917.

7. The Circuit Court for the Interior at Vienna, Part 6, was the appropriate Court in which deposits pursuant to Section 1425 of the General Civil Law Code aforesaid were permitted to be made by citizens of Austria.

113 8. Thereafter, notice of the said deposit in the Circuit Court aforesaid, was given by the defendant, the Wiener Bank-Verein, to the plaintiffs, which notice the plaintiffs received and which is in evidence herein, marked Plaintiff's Exhibit 1.

9. In so far as the facts stipulated herein may be at variance with the pleadings of the respective parties those pleadings are deemed amended to conform to said facts.

Dated, New York, December 5th, 1923.

STOCKTON & STOCKTON,  
Solicitors for Plaintiffs.

114 MANHEIM & WACHTELL,  
Solicitors for Defendant,  
Wiener Bank-Verein.

**Agreed Translation of Defendants' Exhibit A.**

115

We enclose extract of your account closed per  
 .....and showing a balance of  
 K..... in.....favor  
 requesting you to return the enclosed blank after  
 reconciliation duly signed to our address Wiener  
 Bank-Verein, Vienna, 1 Schottengasse 6.

At the same time we beg to request you to take  
 notice of the general conditions, contained within,  
 governing relations with our institution and of the  
 conditions for security accounts.

Yours very truly,

116

WIENER BANK-VEREIN.

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**GENERAL TERMS GOVERNING THE BUSI-  
 NESS RELATIONS WITH THE WIENER  
 BANK-VEREIN.**

1. On rendering statement of an account cur-  
 rent we charge in addition to agreed interest, com-  
 mission and depot fees also postage, stamp-fees,  
 cable—and other petty expenses which can be  
 debited in a lump sum.

117

2. Claims as to statements rendered for cur-  
 rent or safekeeping accounts must be made at  
 latest within four weeks after delivery of such  
 statement. Claims referring to other statements  
 or notices must be submitted to us at latest within  
 three days after delivery of our letter, and when  
 notice has been given by telegraph, on the day of  
 receipt of the telegram.

*Agreed Translation of Defendants' Exhibit A.*

118      Claims regarding execution of stock exchange orders have to be made by telegraph, immediately after receipt of our advice relative thereto. Claims referring to non-execution of stock exchange orders are likewise to be made by telegraph on the day on which in the regular course of mails the stock exchange quotation referred to could have reached the domicile of the customer.

119      In the event that claims are not made in due time according to the above regulations then the statements, contracts and notices as rendered and dispatched by us are to be considered as accepted and found correct. Correctness of notices given by us by telegraph is to be considered as subject to confirmation by mail. All communications addressed by us to our business friends are to be considered as mailed properly when addressed to the last domicile, made known to us.

120      3. Unless otherwise agreed upon, we are entitled to cancel existing connections at any time and according to our free decision. When closing out an account, which is done by way of notice to the account owner, any balance in our favor becomes immediately due and payable to us and no specific request to that effect is required on our part; any liability originating from bills, pledges, guarantees, etc., must be immediately secured upon our demand by a cash deposit. Until such time as all obligations in our favor have been properly fulfilled by the owner of the account, the general conditions as agreed upon remain in force; we are however entitled to charge at least the legal rate of interest on delay in payments.



*Agreed Translation of Defendants' Exhibit A.*

4. In any orders which we receive for the purchase or sale of securities, drafts or foreign exchange, we are at all times permitted to execute such orders either through a third person or to be ourselves the purchaser or seller, as the case may be; this in accordance with the provisions as laid down in Article 376 of the "Handelsgesetzbuch." Should no mention be made in our notices of execution regarding the manner and method of the execution, then we ourselves become the purchaser or seller, as the case may be, of the subject matter of the transaction. 121

5. We are permitted to have orders executed through a third person, and are liable only for our errors in the transmission of such orders to the third person. The same also applies to any securities which we keep in safekeeping with third persons in foreign countries. In the cashing and discounting of any commercial paper on neighboring or foreign places we can at no time assume any responsibility for the time presentment and protest of such commercial paper, nor for the correct handling thereof in accordance with specific regulations. 122

6. Orders received for execution by telegraph and telephone, and further, the transmission of such orders by telegraph or telephone, as well as notices of execution of such orders by telegraph or telephone, are made at the risk of the party giving such orders. 123

7. In the execution of any orders given us by our customer for the payment of any monies to himself or for his account to a third party, if no

*Agreed Translation of Defendants' Exhibit A.*

124 specific instructions are given, we reserve the right to execute such orders in such manner as we may see fit, either making payment at the place indicated, by sending the money, transferring same through the Postal Savings Bank, by crediting the account, remitting by check, etc.

In the absence of instructions to the contrary, checks are mailed in registered letters; money, securities or other valuables, either by stating the full value when expressing the same or having the same insured, in all cases at the risk of the customer.

125 8. Credit entries made against checks, drafts, drawn securities or such on which notice has been given, coupons, etc., are always to be considered subject to payment thereof.

We are entitled to the claims and rights accruing to as out of unpaid drafts or checks against prior endorsers and other liable parties, even in the event that the account of the remitter has already been debited for non payment of the item.

126 9. Information, recommendations and counsel and advice are at all times gladly given to the best of our knowledge, but without any responsibility on our part.

10. For all claims of a legal nature the Head Office and its several branches are to be considered as one.

11. The relations existing between us and our business friends will in general be governed by the laws in force in Austria. So far as transactions with our main office come into considera-

*Agreed Translation of Defendants' Exhibit A.*

tion, the City of Vienna is to be considered the place where payment is to be made or where obligations are to be met as the case may be. In transactions existing between customers and our branches, the City where the branch is domiciled becomes the place of payment or the place of fulfillment of liabilities as the case may be. For the execution however of stock exchange orders the conditions in force on the stock exchange where such orders are executed will rule. This applies also to stock exchange orders where we ourselves enter as buyers or sellers for own account.

127

128

REGULATIONS GOVERNING SECURITY DEPOSIT  
ACCOUNTS:

1. We guarantee according to law the safekeeping for our clients of securities as well as of private documents.

2. Any business arising out of the safekeeping of such securities, as for instance the cashing of coupons, as well as of any drawn or due securities, the renewal of the coupon sheets, etc., we shall attend to without being requested to do so by the customer: we assume, however, no obligation or liability in such instances and it is up to the customer to let us have the necessary instructions from time to time regarding such matters. Payments on account of securities, exchanging or converting same, the exercise of rights and other matters of a similar nature we shall only execute on explicit orders, but we will endeavor, without any obligation on our part, to advise the customer in time of such due dates, etc.

129

*Agreed Translation of Defendants' Exhibit A.*

130 All securities which are received at our various Receiving Tellers windows will be subjected to a revision whether a notice regarding same has been posted, in accordance with the "Amtlicher Anzeiger." All drawn securities will be subjected to a scrutiny in accordance with the drawn lists, and the drawn pieces will be collected as soon as possible.

For any error in these revisions and for any consequences which may result by virtue of steps taken for the purpose of amortization of securities as well as for any legal proceedings arising therefrom we do not assume any liability whatsoever.

131

Unless specific instructions to any other effect will reach us in due time, we are all times permitted to exercise any voting privileges which may arise from or are attached to any securities which we are holding in safekeeping for our customers.

3. The fees for the safekeeping of securities will be charged according to the market value of the securities, listed on the stock exchange if the market price is higher than the nominal value, in other cases the nominal value will be the guide.

132 In the absence of any agreement as to the fees to be charged for the safekeeping of securities, such fees will be charged in accordance with our printed tariff.

4. Any securities which have been purchased for our clients in foreign places and have been taken over for them in foreign countries, will, as a rule be kept in safekeeping at such foreign places for our clients, at our risk, as far as the selection of the depositary is concerned, unless instructions

*Agreed Translation of Defendants' Exhibit A.*

have been given to have the securities forwarded 133  
to us.

5. All securities, including interest and dividend coupons due and to grow due, as well as all other objects of value, particularly commodities and goods, which in the course of our business transactions with our customers have come into our possession or partial possession, will constitute without any previous agreement to that effect, liens in our favor to secure all obligations due and to grow due, for their account, and we are entitled, without prior judicial procedure, to sell the property subject to the lien at any time 134  
suitable to us and at any place in order to satisfy our claims, and any claims of our debtors can be adjusted by way of compensation, or all their claims can be refused acknowledgment by us until ours have been fully satisfied. As for pass books of Savings Banks, Banking Associations or Banks, including such of our own issue, we have at all times the right to withdraw the deposits up to the full amount of our claims against the owner.

**Stipulation Amending Previous Stipulation.**

136

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

In Equity—E 23 -160.

LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN  
H. HAUSER, JOHN S. SCULLY, SIMON B. BLU-  
MENTHAL, DAVID FORSHAY and ISAAC GUTEN-  
STEIN, co-partners doing business under the  
firm name and style of Zimmermann & For-  
shay, as brokers,

137

Plaintiffs,

—against—

THOMAS W. MILLER, as Alien Property Custodian  
of the United States, and FRANK WHITE, as  
Treasurer of the United States, and the  
WIENER BANK-VEREIN of Vienna, Austria,  
Defendants.

138

IT IS HEREBY STIPULATED between the solicitors  
for the plaintiffs and the solicitors for the de-  
fendant, Wiener Bank-Verein, that the stipulation  
made between the said solicitors and dated New  
York, December 5, 1923 be amended as follows,  
the provisions of paragraph 9 of said stipulation  
of December 5, 1923 to apply with equal force  
to the amendments hereby inserted.

1. That paragraph 5 of the stipulation dated  
New York, December 5, 1923, above mentioned  
is modified by striking out the last line thereof  
reading

"11.80 United States cents for each  
Austrian krone"

*Stipulation Amending Previous Stipulation.*

and inserting in place thereof the words

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"11.18 United States cents for each Austrian krone."

2. That a new paragraph, numbered 8A, is inserted in said stipulation dated December 5, 1923, as follows:

"8A. From the time when the plaintiffs opened the account sued on with the defendant, Wiener Bank-Verein, said defendant credited the plaintiffs' said account with interest at the rate of  $2\frac{1}{2}$  per cent. per annum to April 6, 1917. In the quarterly statements of account rendered by the defendant bank to the plaintiffs, the fact that interest was so credited at such rate was shown and the plaintiffs did not object to the rate at which interest was thus credited on their account by said defendant.

140

The deposit made in the Circuit Court of Vienna, Part VI, on April 1, 1920, of the number of kronen in defendant bank stated to be due and owing to the plaintiffs as of April 6, 1917, included a further sum of kronen sufficient to equal  $2\frac{1}{2}$  per cent. per annum interest down to April 1, 1920, the date of such deposit, on the amount stated to be due and owing to plaintiffs as of April 6, 1917."

141

3. That a further new paragraph, numbered 8-B, is inserted in said stipulation dated December 5, 1923, as follows:

*Stipulation Amending Previous Stipulation.*

- 142           "8B. On or about March 25, 1919 the plaintiffs filed with the Alien Property Custodian of the United States a notice of claim, substantial copy of which is annexed hereto and made a part hereof and is admitted in evidence, marked 'Plaintiffs' Exhibit 4.' "

Dated, New York, December 18, 1923.

STOCKTON & STOCKTON,  
Solicitors for the Plaintiffs.

- 143           MANHEIM & WACHTELL,  
Solicitors for the Defendant,  
Wiener Bank-Verein.



### Plaintiffs' Exhibit 4.

Reed. A. P. C. Mar. 25, 1919, Claim #802.  
Wiener Bank Verein, Vienna.

145

Nixed

### ALIEN PROPERTY CUSTODIAN.

NOTICE OF CLAIM PURSUANT TO SECTION 9 OF  
"TRADING WITH THE ENEMY ACT."

#### INSTRUCTIONS.

Notice of claim, under oath, must be executed in duplicate by claimant and filed with the Alien Property Custodian, attention of Bureau of Law, Washington, D. C.

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If claimant makes application to the Attorney General, in pursuance of sec. 9 of the "Trading with the enemy Act," and the Presidential Executive Orders thereunder, for the payment, conveyance, transfer, assignment, or delivery to said claimant of money or other property held by the Alien Property Custodian, he must append to his application to the Attorney General a sworn copy of this notice of claim.

Each individual claim must be presented on a separate form.

147

Section 2 of the "Trading with the enemy Act" defines "enemy" and "ally of enemy" as follows:

"Sec. 2. That the word 'enemy,' as used herein, shall be deemed to mean, for the purposes of such trading and of this act—

"(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory

*Plaintiffs' Exhibit 4.*

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(including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

149

“(b) The government of any nation with which the United States is at war or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof.

150

“(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term ‘enemy.’

“The words ‘ally of enemy,’ as used herein, shall be deemed to mean——

“(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation which is an ally of a nation with which the United States is

*Plaintiffs' Exhibit 4.*

at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of such ally nation, or incorporated within any country other than the United States and doing business within such territory. 151

"(b) The government of any nation which is an ally of a nation with which the United States is at war, or any political or municipal subdivision of such ally nation, or any officer, official, agent, or agency thereof. 152

"(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation which is an ally of a nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term 'ally of enemy.' " 153

The Presidential Proclamation of February 5, 1918, in pursuance of section 2 (c) of the act, included within the meaning of the word "enemy," for the purpose of the "Trading with the enemy Act":

"All natives, citizens, or subjects of the German Empire or of the Austro-Hungarian Empire who, by virtue of the provisions of sections four thousand and sixty-seven,

*Plaintiffs' Exhibit 4.*

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four thousand and sixty-eight, four thousand and sixty-nine, and four thousand and seventy, of the Revised Statutes, and of the proclamations and regulations thereunder, have been heretofore or may be thereafter transferred after arrest into the custody of the War Department for detention during the war."

Section 9 of the "Trading with the enemy Act" is as follows:

155

"Sec. 9. That any person, not an enemy, or ally of enemy, claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the alien property custodian hereunder, and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy, or ally of enemy, whose property, or any part thereof, shall have been conveyed, transferred, assigned, delivered, or paid to the alien property custodian hereunder, and held by him or by the Treasurer of the United States, may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may, with the assent of the owner of said property and of all persons claiming any right, title, or interest therein, order the payment, conveyance, transfer, assignment, or delivery to said claimant of the

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*Plaintiffs' Exhibit 4.*

money or other property so held by the alien property custodian or by the Treasurer of the United States or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application, or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may, at any time before the expiration of six months after the end of the war, institute a suit in equity in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the alien property custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if suit shall be so instituted then the money or other property of the enemy or ally of enemy, against whom such interest, right, or title is asserted, or debt claimed, shall be retained in the custody of the alien property custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall

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159

*Plaintiffs' Exhibit 4.*

160

be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant or by the alien property custodian or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant, or suit otherwise terminated.

161

"Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the alien property custodian shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court."

The Executive Order of October 12, 1917, provides, among other things, as follows:

"XXXII. I vest in the Attorney General all power and authority conferred upon the President by the provision of section 9 of the 'Trading with the enemy Act.'"

TO FRANCIS P. GARVAN,  
Alien Property Custodian,  
162 Washington, D. C.

The undersigned, hereinafter referred to as claimant, desiring to take advantage of section 9 of the "Trading with the enemy Act," hereby gives you notice of claim, as follows, and hereby agrees to furnish such other information and proof as you may require.

1. Name of claimant (individual, partnership, association, corporation): Z. & F.

*Plaintiffs' Exhibit 4.*

2. Address of claimant: 9 Wall St., N. Y. C. 163

3. Name of enemy or ally of enemy whose property is affected by this claim: Wiener Bank-Verein.

4. Residence or last known address of enemy or ally of enemy: Vienna, Austria.

5. Name of any other persons, if known to claimant, who have any interest whatever in within claim: Numerous customers listed in statement filed with A. P. C. Bureau 2/3/19.

6. Address or addresses of such person or persons: ..... 164

7. If the claim, notice of which is hereby given, is made for certain specific property, or for an interest in property, the following question must be answered:

(a) The said property was conveyed, transferred, assigned, or delivered to Alien Property Custodian by:.....

Address: .....  
(No.) (Street.) (City.) (Country.)

(b) The following is an accurate description of the property affected by this notice of claim (this description must be sufficiently complete to identify the property): ..... 165

8. The nature of the claim, notice of which is hereby given, is as follows: (If the claim is for only part of the property, describe that part; if of an interest, state precisely what the interest is; if of a debt, state fully the nature thereof, how it is evidenced, and whether there are any

*Plaintiffs' Exhibit 4.*

- 166 set-offs or counterclaims. Attach verified copies of all papers relied on to support claim.)

Monies & securities due to claimant as follows:

		Face or par-value	
Value	Cash Bal.	of securities	Total Amt.
\$	50.02		50.02
Kronen	2,951,027.33	1,080,800.—	4,031,827.33

Interest accrued from 1/1/16

On cash bal. at 4%

On securities (see statement filed 2/3/19)

- 167 The claimant represents and alleges that claimant is not an enemy or ally of enemy; that no person or persons whatsoever, except as above stated, have any interest in or lien upon the proceeds of the claim set forth in the within notice; that this notice is not filed in collusion with any enemy or ally of enemy, or any other person or persons for the purpose of avoiding the terms and provisions of the "Trading with the enemy Act"; that the claim herein referred to is in all respects bona fide, and that there are no set-offs, counterclaims, or defenses, except as herein stated.

- 168 Dated Mar. 19, 1919.

(Signature of party making claim.) Z. & F.  
M. H. H.

(Partnerships should sign by member or duly authorized representative. Corporations or associations should sign by officer or duly authorized representative, and should affix corporate or official seal.)

(Seal.)



**Opinion.**

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**UNITED STATES DISTRICT COURT,****SOUTHERN DISTRICT OF NEW YORK.****E 23-160.**


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LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN  
H. HAUSER, JOHN S. SCULLY, SIMON B. BLU-  
MENTHAL, DAVID FORSHAY and ISAAC GUTEN-  
STEIN, co-partners doing business under the  
firm name and style of Zimmermann & For-  
shay, as brokers,

Plaintiffs,

170

—against—

THOMAS W. MILLER, as Alien Property Custodian  
of the United States, and FRANK WHITE,  
as Treasurer of the United States, and the  
WIENER BANK-VEREIN, of Vienna, Austria,  
Defendants.

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STOCKTON & STOCKTON (Joseph M. Hartfield and  
Hamilton Vreeland, Jr., of Counsel), Solicit-  
ors for Plaintiffs.

WM. HAYWARD (Thomas J. Crawford, Assistant  
U. S. Attorney, of Counsel), U. S. Attorney,  
Solicitor for Defendants Miller and White.

171

MANHEIM & WACHTELL, Solicitors for Defendant  
Wiener Bank-Verein, Austria.

KNOX, *D. J.*

This suit is brought under Section 9 of the  
Trading with the Enemy Act for the recovery  
by plaintiffs of the dollar value as of April 6,

*Opinion.*

172 1917 of 2,063,799.03 kronen which were then on deposit with the Wiener Bank-Verein of Vienna, Austria, and which are said to have been due and owing.

The Alien Property Custodian and the Treasurer of the United States admit their possession of certain money and property which was, pursuant to statute requirement, determined to belong to the bank, during the time it was an alien enemy, and which, for that reason, was sequestered. They also allege that suits of persons other than plaintiffs are pending against them whereby it is sought to collect the sum of about  
173 \$750,000 from said money and property.

The bank admits that as of April 6, 1917, plaintiffs had on deposit with it the specific number of kronen, and that these were held subject to orders for the disposal thereof. Denial is made that payment of the kronen was due as claimed by plaintiffs.

The parties, excepting the Custodian and the Treasurer, have stipulated the following facts:

1. That the bank was organized and, prior to and during the war functioned under the laws of the Empire of Austria-Hungary; that  
174 it still does business in Vienna under a validation of its charter by the Austrian Government. It has no branch office within the United States.

2. That plaintiffs, for a number of years preceding the outbreak of war, maintained a bank account with the bank in which they made deposits in kronen for the purpose of providing payment of their drafts and orders issued and

*Opinion.*

transmitted by letter, cable, wireless, etc., and drawn on and payable at the bank. 175

3. That at least every three months plaintiffs received in ordinary course periodic statements of the condition of the account. These were upon a printed form containing the following provision:

"The relations existing between us and our business friends will in general be governed by the laws in force in Austria. So far as transactions with our main office come into consideration, the City of Vienna is to be considered the place where payment is to be made or where obligations are to be made, as the case may be. In transactions existing between customers and our branches, the City where the branch is domiciled becomes the place of payment or the place of fulfillment of liabilities as the case may be." 176

4. That at all times from a time prior to the opening of the account, Section 1425 of the General Court law of Austria continued and remained in force. It reads: 177

"If a debt cannot be paid because the creditor is unknown, absent or dissatisfied with the offer, or because of other important reasons, the debtor may deposit in court the subject matter in dispute; or, if it is not susceptible of such action he may take legal steps for its custody. If legally carried out and the creditor has been informed thereof, either of these

*Opinion.*

178           measures discharges the debtor of his obligation, and places the subject matter delivered at the risk of the creditor."

179           5. That after July 14, 1919, and prior to April 1, 1920, plaintiffs refused to accept the kronen on deposit with the bank, offered either in kind or in United States currency, at the rate of exchange then prevailing, but demanded the amount of said kronen on deposit as of April 6, 1917, at the average cable transfer rate of exchange between the two currencies prevailing in the United States during the month immediately preceding the outbreak of the war, viz: 11.18 United States cents for each kronen.

          6. That on or about April 1, 1920, the bank deposited in the Circuit Court for the Interior at Vienna, in part 6 thereof, the number of kronen stated to be due and owing as of April 6, 1917.

          7. That such Circuit Court was the appropriate depository for deposits made pursuant to Section 1425 of the General Civil Law Code.

180

          8. That notice of the deposit was given to and received by the plaintiffs.

          8-a. That plaintiffs' account, during its existence, was credited with interest at  $2\frac{1}{2}\%$  per annum down to April 6, 1917, and such credits were shown on all quarterly statements of the account; and that such interest was calculated to the day of the deposit of the funds in the Circuit Court and was included therein.

*Opinion.*

8-b. That on March 25, 1919, plaintiffs filed their claim with the Alien Property Custodian for the moneys alleged to be due and owing from the bank.

181

Prior to the outbreak of war between the United States and Austria, upon December 7, 1917, plaintiffs made no demand for their balance upon deposit with the bank. Until such demand was made, the balance upon deposit was not due and payable. *Zimmermann & Forshay v. Miller and Deutsche Bank*, decided April 25, 1924. During the continuance of the war, and down to July 14, 1919, when trade relations and communications were re-established between Nationals of the United States and Austria, no demand upon the bank for payment could lawfully be made. This is true even though the bank at all times had an agent within the United States. The agent, assuming him to have been in funds, was not permitted to deal with plaintiffs upon behalf of his principal. Nor, is the circumstance that the bank, throughout the period of the war, continued to make payments upon account of outstanding orders of the plaintiff (there being no provision of Austrian law to the contrary) of any particular consequence. The war and our law, incident thereto, made it impossible to demand payment of the account from the bank. Had it been the desire of plaintiffs to render their deposit due and payable during the progress of the war, they should have made demand upon the Custodian. I quote from Section 8 of the Trading with the Enemy Act.

182

183

"That any person not an enemy or ally of enemy who is a party to any lawful

*Opinion.*

- 184 contract with the enemy or ally of enemy,  
the terms of which provide for a termina-  
tion thereof upon notice or for acceleration  
of maturity on presentation or demand  
\* \* \* may terminate or mature such  
contract by notice or presentation or de-  
mand served or made on the Alien Prop-  
erty Custodian in accordance with the law  
and the terms of such instrument or con-  
tract and under such rules and regulations  
as the President shall prescribe and such  
notice and such presentation and demand  
185 shall have in all respects the same force  
and effect as if duly served or made upon  
the enemy or ally of enemy personally."

Not having seen fit to take advantage of this provision of law, plaintiffs cannot here be heard to complain that during their inaction and before the time at which they demanded payment from the bank after July 14, 1919, the rate of exchange of Austrian kronen continued to fall to their detriment.

- 186 So far as the evidence shows, the first communication bearing the suggestion of a demand for the payment of plaintiffs' credit balance is to be found in their cable of August 12, 1919, reading as follows:

"Referring to our old balance will you consent to American Alien Property Custodian paying us out of your former funds in his custody equivalent in dollars at March fifteenth nineteen seventeen rate of eleven eighteen STOP if you agree wire us to that

*Opinion.*

effect and we will send you necessary papers to be filled out and signed by you **STOP** this will obviate lawsuit which we otherwise will be compelled to institute."

187

The cable was not understood by the bank and on August 12, 1919, it sent plaintiffs this reply:

"Your cable regarding our consent to custodian incomprehensible wire details and reasons and transactions concerned."

No particular attention seems to have been paid to the message and the bank soon proceeded to exchange the kronen of plaintiffs' old account, which had ceased to be legal tender in Austria, into a new issue of kronen. Protest was made to this action and about April 1, 1920, the bank reestablished the old account. This being done, the proceeds were deposited in Court pursuant to the Section of the Austrian Civil Code, heretofore quoted. Plaintiffs were given the privilege to order the deposit withdrawn, and to again establish the account in new kronen upon the bank's books. This privilege was never exercised.

188

Upon this evidence, and upon the stipulation of facts, it is difficult to arrive at a conclusion as to the exact date upon which plaintiff's cause of action arose: It may be said, for instance, that the cable of August 12, 1919, lacked some of the elements of a proper demand, and that for such reason, liability should not be imposed as of August 12, 1919.

189

The stipulation of facts merely says that after July 14, 1919, and prior to the first day of

*Opinion.*

190 April, 1920, "plaintiffs refused to accept the kronen on general deposit \* \* \* as offered either in kind or in United States currency at the rate of exchange then prevailing \* \* \* Since neither of the parties has chosen to introduce into evidence all of the correspondence passing between them over the period extending from August 12, 1919 to April 1, 1920, I am perhaps warranted in taking the former date as the day of demand, although the cable lacked some of the characteristics of a legal demand, it was sufficient to apprise the bank that plain-  
191 tiffs wanted their money—even now, the parties are no nearer an agreement as to what rate of exchange should be applied in converting the kronen into exchange than they were upon the day the cable was sent. When the message was received, the bank might well have offered the deposit as of the rate of exchange then prevailing. Not having done so, there is no injustice, I think, in holding that day to be the one as of which the account is to be settled, and I so hold.

One question remains and it is this—The bank argues that its deposit of April 1, 1920 with the Austrian Court, pursuant to Section 1425 of  
192 the Austrian Civil Code, should be regarded as a discharge of its obligation, and as casting the risk of further depreciation of the kronen upon the plaintiffs. Unless I am in error in having fixed August 12, 1919 as the day upon which plaintiffs were entitled to their deposit, there can be no merit in the bank's contention. Obviously, the deposit of April 1, 1920 may not have been commensurate with the extent of the bank's liability, as of August 12, 1919, and the bank not



*Opinion.*

having had an opportunity to receive kronen converted into dollars as of that date, cannot be called upon to suffer subsequent declines in such value.

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Furthermore, the Trading with the Enemy Act affords plaintiffs a remedy by which they may here obtain such relief as they are entitled to receive. The extent and character of the relief to be afforded is not to be impaired or frustrated by what the debtor may have chosen to do pursuant to the provisions of a foreign statute. Should the present bill be dismissed, as is asked, plaintiffs would be required to collect their debt, whatever it may now be worth, at Vienna. Such result would not comport with the purpose of our own remedial legislation.

194

Plaintiffs may have a decree for the value of their deposit in dollars calculated at the rate of exchange prevailing as between kronen and dollars upon August 12, 1919, with interest from that date.

April 25, 1924.

U. S. D. J.

195

# **Notice of Entry of Final Decree.**

196

**UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.  
E. 23-160.**

**LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN  
H. HAUSER, JOHN S. SCULLY, SIMON B.  
BLUMENTHAL, DAVID FORSHAY and ISAAC  
GUTENSTEIN, co-partners, doing business un-  
der the firm name and style of Zimmermann  
& Forshay, as brokers,**

**Plaintiffs,**

**—against—**

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**THOMAS W. MILLER, as Alien Property Custodian  
of the United States, and FRANK WHITE, as  
Treasurer of the United States, and the  
WIENER BANK-VEREIN, of Vienna, Austria,  
Defendants.**

*Sirs:*

PLEASE TAKE NOTICE that the within is a true copy of a decree duly made and entered in the within entitled suit and filed in the office of the Clerk of the United States District Court, for the southern district of New York, on the 28th day of June, 1924.

Dated, New York, June 28th, 1924.

Yours, etc.,

198

**STOCKTON & STOCKTON,**

Solicitors for Plaintiffs,

Office & P. O. Address,

2 Rector Street,

New York City.

To:

**MANHEIM & WACHTELL, ESQS.,**

Solicitors for Defendant,

Wiener Bank-Verein,

1328 Broadway, New York City.

**WILLIAM HAYWARD, ESQ.,**

Solicitor for Defendants,

Thomas W. Miller and Frank White.

**Final Decree.**

199

At a Term of the United States District Court, held in and for the Southern District of New York, at the United States Court House, Post Office Building, Borough of Manhattan, City of New York, on the 24th day of June, 1924.

Present :—HON. JOHN C. KNOX,

*U. S. District Judge.*

E. 23-160.

200

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LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H. HAUSER, JOHN S. SCULLY, SIMON B. BLUMENTHAL, DAVID FORSHAY and ISAAC GUTENSTEIN, co-partners doing business under the firm name and style of Zimmermann & Forshay, as brokers,

Plaintiffs,

—against—

THOMAS W. MILLER, as Alien Property Custodian of the United States, and FRANK WHITE, as Treasurer of the United States, and the WIENER BANK-VEREIN, of Vienna, Austria,

Defendants.

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201

This case came on to be heard, and after hearing the testimony of the parties and the argument, and upon filing of the opinion of the Court, it was

ORDERED, ADJUDGED AND DECREED, that the defendant Wiener Bank-Verein of Vienna, Austria, is justly and truly indebted to the plaintiffs in

*Final Decree.*

202 the sum of Fifty thousand, nine hundred and  
nineteen dollars and ninety-seven cents (\$50,-  
919.97), and it is further

203 ORDERED, ADJUDGED AND DECREED, that the de-  
fendants, Thomas W. Miller, as Alien Property  
Custodian of the United States, and Frank White,  
as Treasurer of the United States, pay over to  
the plaintiffs, from the property and money of  
said defendant Wiener Bank-Verein of Vienna,  
Austria, held by said Thomas W. Miller, as Alien  
Property Custodian of the United States, and/or  
Frank White, as Treasurer of the United States,  
the sum of Fifty thousand, nine hundred and  
nineteen dollars and ninety-seven cents (\$50,-  
919.97), with interest thereon from August 12,  
1919, in the sum of fourteen thousand, seven  
hundred sixty-six dollars and eighty cents  
(\$14,766.80), together with the plaintiffs' costs  
herein as taxed at one hundred five dollars and  
eighty cents (\$105.80), within 90 days after the  
entry of this order.

(Sd) JNO. C. KNOX,  
United States District Judge.

204

## Plaintiffs' Petition for Appeal.

UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.  
E. 23-160.

205

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LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H.  
HAUSER, JOHN S. SCULLY, SIMON B. BLUMEN-  
THAL, DAVID FORSHAY and ISAAC GUTENSTEIN,  
co-partners doing business under the firm  
name and style of Zimmermann & Forshay,  
as brokers,

Plaintiffs,

—against—

THOMAS W. MILLER, as Alien Property Custodian  
of the United States, and FRANK WHITE, as  
Treasurer of the United States, and the  
WIENER BANK-VEREIN, of Vienna, Austria,  
Defendants.

206

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*To the Honorable District Judge:*

The above named plaintiffs, feeling aggrieved  
by the decree rendered and entered in the above  
entitled cause on the 24th day of June, A. D.  
1924, do hereby appeal from said decree to the  
Circuit Court of Appeals for the Second Circuit  
for the reasons set forth in the assignment of  
errors filed herewith, and they pray that their  
appeal be allowed and that citation be issued as  
provided by law, and that a transcript of the  
record of proceedings and of the documents upon  
which said decree was based, duly authenticated,  
be sent to the Circuit Court of Appeals for the  
Second Circuit under the rules of such Court  
in such cases made and provided, and your peti-  
tioners further pray that a proper order relating  
to the security to be required of them be made.

207

Dated, New York, August 26, 1924.

(Sd) STOCKTON & STOCKTON,  
Solicitors for Plaintiffs.

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### Plaintiffs' Assignments of Error.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

E. 23-160.

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LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H. HAUSER, JOHN S. SCULLY, SIMON B. BLUMENTHAL, DAVID FORSHAY and ISAAC GUTENSTEIN, co-partners doing business under the firm name and style of Zimmermann & Forshay, as brokers,

Plaintiffs,

209

—against—

THOMAS W. MILLER, as Alien Property Custodian of the United States, and FRANK WHITE, as Treasurer of the United States, and the WIENER BANK-VEREIN, of Vienna, Austria, Defendants.

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210

COME, NOW, the above named plaintiffs and file the following assignments of error, upon which they will rely upon their appeal from the decree made by this Honorable Court on the 24th day of June, 1924, in the above entitled cause.

First: That the Court erred in holding that until demand was made by plaintiffs for the balance on deposit with defendant bank, said debt was not due and payable although it was owing to and owned by plaintiffs on October 6, 1917.

Second: That the Court erred in not holding that there is an account stated as of April 6, 1917, from defendant bank to plaintiffs.

*Plaintiffs' Assignments of Error.*

Third: That the Court erred in not holding that there was a breach of the contract of deposit by reason of the notice of claim filed by plaintiffs with the Alien Property Custodian on March 25, 1919. 211

Fourth: That the Court erred in not holding that the contract of deposit was terminated and dissolved by the inception of the state of war between the United States and Austria Hungary.

Fifth: That the Court erred in not holding that the contract was terminated and dissolved by the international legal rule of non-intercourse between alien enemies, the test of alien enemy character being commercial domicile. 212

Sixth: That the Court erred in not holding that the contract of deposit was terminated and dissolved by the provisions of the Trading with the Enemy Act of the United States, forbidding intercourse with an "enemy" or "ally of enemy."

Seventh: That the Court erred in not holding that the kronen debt owing by defendant bank should be recovered by plaintiffs in dollars at the average cable transfer rate of exchange for United States dollars and Austrian kronen prevailing in the United States on or about April 6, 1917. 213

Eighth: That the Court erred in not holding that the plaintiffs are entitled to interest on the amount of dollars specified in the 7th paragraph hereof at the rate of six per cent. per annum from April 6, 1917. 213

*Plaintiffs' Assignments of Error.*

214 Ninth: That the Court erred in not holding that the kronen debt owing by defendant bank should be recovered by plaintiffs in dollars at the average cable transfer rate of exchange for United States dollars and Austrian kronen prevailing in the United States in or about the months of November and December, 1917.

Tenth: That the Court erred in not holding that plaintiffs are entitled to interest on the dollars specified in paragraph 9th hereof at the rate of five per cent. per annum from December 7, 1917.

215

WHEREFORE plaintiffs appellants pray that the decree of the said Court may be modified and in order that the foregoing assignments of error may be made a part of the record, the plaintiffs-appellants present the same to the Court and pray that such disposition be made thereof as is in accordance with law and the Statutes of the United States in such matter made and provided, all of which is respectfully submitted.

Dated, New York, August 27, 1924.

216

STOCKTON & STOCKTON,  
Solicitors for Plaintiffs-Appellants,  
Office & P. O. Address,  
2 Rector Street,  
Borough of Manhattan,  
New York City.



## Allowance of Plaintiffs' Appeal.

217

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

E. 23-160.

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LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H. HAUSER, JOHN S. SCULLY, SIMON B. BLUMENTHAL, DAVID FORSHAY and ISAAC GUTENSTEIN, co-partners doing business under the firm name and style of Zimmermann & Forshay, as brokers,

Plaintiffs,

218

—against—

THOMAS W. MILLER, as Alien Property Custodian of the United States, and FRANK WHITE, as Treasurer of the United States, and the WIENER BANK-VEREIN, of Vienna, Austria,

Defendants.

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Upon reading the petition of the plaintiffs herein for the allowance of an appeal, and on consideration of the assignment of errors presented therewith, it is

ORDERED that the appeal as prayed for be and it hereby is allowed and that a certified transcript of the record and proceedings be forthwith transmitted to the Circuit Court of Appeals for the Second Circuit, and

219

FURTHER ORDERED that the bond on appeal be fixed at the sum of \$250.00.

Dated, New York, August 26, 1924.

WILLIAM BONDY,  
U. S. D. J.

### Citation on Appeal by Plaintiffs.

220

*To Thomas W. Miller, as Alien Property Custodian of the United States, and Frank White, as Treasurer of the United States, and the Wiener Bank-Verein, of Vienna, Austria.*

#### GREETING :

221

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals, for the Second Circuit, to be holden at the Borough of Manhattan, in the City of New York, in the District and Circuit above named on the 25th day of September, 1924, pursuant to an allowance of appeal filed in the Clerk's office of the District Court of the United States, for the Southern District of New York, wherein Leopold Zimmermann, Louis J. Rees, Maryan H. Hauser, John S. Scully, Simon B. Blumenthal, David Forshay and Isaac Gutenstein, co-partners doing business under the firm name and style of Zimmermann & Forshay, as brokers, are appellants and you are the appellees, to show cause, if any there be, why the final decree in said allowance of appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

222

Given under my hand at the Borough of Manhattan, City of New York, in the District and Circuit above named this 26th day of August, in the year of our Lord, one thousand nine hundred and twenty-four, and the Independence of the United States one hundred and forty-ninth.

WILLIAM BONDY,  
U. S. District Judge.

## Plaintiffs' Notice of Appeal.

223

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

E. 23-160.

---

LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H. HAUSER, JOHN S. SCULLY, SIMON B. BLUMENTHAL, DAVID FORSHAY and ISAAC GUTENSTEIN, co-partners doing business under the firm name and style of Zimmermann & Forshay, as brokers,

Plaintiffs,

—against—

224

THOMAS W. MILLER, as Alien Property Custodian of the United States, and FRANK WHITE, as Treasurer of the United States, and the WIENER BANK-VEREIN, of Vienna, Austria,

Defendants.

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*Sirs:*

PLEASE TAKE NOTICE that the above named plaintiffs hereby appeal to the Circuit Court of Appeals, for the Second Circuit, from the final decree made and entered on the 24th day of June, 1924, directing that the defendants Thomas W. Miller, as Alien Property Custodian of the United States, and Frank White, as Treasurer of the United States, pay over to the plaintiffs from the property and money of said defendant, Wiener Bank-Verein, of Vienna, Austria, held by said Thomas W. Miller, as Alien Property Custodian of the United States, and/or Frank White, as Treasurer of the United States, the sum of Fifty thousand, nine hundred nineteen and ninety-seven hun-

225

*Plaintiffs' Notice of Appeal.*

226 dredths dollars (\$50,919.97), with interest thereon from August 12, 1919, at the rate of six per cent. per annum in the sum of Fourteen thousand seven hundred sixty-six and eighty hundredths dollars (\$14,766.80), together with the plaintiffs' costs herein as taxed at \$105.80 within ninety days after the entry of said order, and more particularly so much of said final decree as only allows the plaintiffs to recover the kronen debt in question at an August 12, 1919, rate of exchange between kronen and dollars, and as only allows the plaintiffs interest from August 12, 1919.

227

Dated, New York, August 27, 1924.

Yours, etc.,

STOCKTON & STOCKTON,

Solicitors for Plaintiffs,

Office & P. O. Address,

2 Rector Street,

New York City.

To:

CLERK UNITED STATES DISTRICT COURT,

Southern District of New York.

228

WILLIAM HAYWARD, Esq.,

Solicitor for Defendants,

Thomas W. Miller and Frank White,

Post Office Building,

New York City.

MANHEIM & WACHTELL, ESQS.,

Solicitors for Defendant,

Wiener Bank-Verein,

1328 Broadway,

New York City.

# **Petition for Appeal of Defendant Bank.**

**UNITED STATES DISTRICT COURT,**

**SOUTHERN DISTRICT OF NEW YORK.**

**E. 23-160.**

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**LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H. HAUSER, JOHN S. SCULLY, SIMON B. BLUMENTHAL, DAVID FORSHAY and ISAAC GUTENSTEIN, co-partners doing business under the firm name and style of Zimmermann & Forshay, as brokers,**

**Plaintiffs,**

**—against—**

**THOMAS W. MILLER, as Alien Property Custodian of the United States and FRANK WHITE, as Treasurer of the United States, and the WIENER BANK-VEREIN, of Vienna, Austria,**  
**Defendants.**

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*To the Honorable District Judge:*

The above named defendant, Wiener Bank-Verein, of Vienna, Austria, feeling aggrieved by the decree rendered and entered in the above entitled cause on the 24th day of June, A. D. 1924, does hereby appeal from said decree to the Circuit Court of Appeals, for the Second Circuit, for the reasons set forth in the assignment of errors filed herewith, and prays that its appeal be allowed, and that a citation be issued as provided by law, and that a transcript of the record of proceedings and of the documents upon which said decree was based, duly authenticated, be sent to the Circuit Court of Appeals for the Second Circuit, under the rules of such court, in such cases made and provided, and your petitioners further

229

230

231

*Assignment of Errors of Defendant Bank.*

232 pray that a proper order relating to the security to be required of said defendant, if any, be made.

Dated, New York, September 15th, 1924.

MANHEIM & WACHTELL,  
Solicitors for Deft. Wiener Bank-Verein,  
1328 Broadway, New York City,  
Borough of Manhattan.

**Assignments of Error of Defendant Bank.**

UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.  
E. 23-160.

233

LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H. HAUSER, JOHN S. SCULLY, SIMON B. BLUMEN-THAL, DAVID FORSHAY and ISAAC GUTENSTEIN, co-partners doing business under the firm name and style of Zimmermann & Forshay, as brokers,

Plaintiffs,

—against—

THOMAS W. MILLER, as Alien Property Custodian of the United States, and FRANK WHITE, as Treasurer of the United States, and the WIENER BANK-VEREIN, of Vienna, Austria,

234

Defendants.

NOW COMES the above named defendant, Wiener Bank-Verein, of Vienna, Austria, and files the following assignments of error, upon which it will rely upon its appeal from the decree made by this Honorable Court, on the 24th day of June, 1924, in the above entitled cause.

First: That the Court erred in holding that the plaintiffs made a sufficient demand for the balance on deposit with said defendant Bank, on August 12th, 1919.

*Assignment of Errors of Defendant Bank.*

Second: That the Court erred in holding that the cable of August 12th, 1919, was a sufficient demand for such balance on deposit, with said defendant Bank.

235

Third: That the Court erred in holding that the plaintiffs were entitled to recover the kronen balance on deposit, in dollars, at the rate of exchange existing on August 12th, 1919.

Fourth: That the Court erred in holding that the plaintiffs were entitled to recover interest at the rate of six per cent. per annum, from August 12th, 1919.

236

Fifth: That the Court erred in not holding that the plaintiffs had failed and omitted to make any sufficient demand for the balance on deposit.

Sixth: That the Court erred in not holding that the plaintiffs were entitled to recover the amount of the kronen balance in this suit, if at all, at the rate of exchange prevailing at the time of the trial or of the decree.

Seventh: That the Court erred in not holding that no sufficient demand for the balance on deposit having been made, the suit was prematurely brought.

237

Eighth: That the Court erred in not dismissing the bill of complaint.

Dated, New York, September 15th, 1924.

MANHEIM & WACHTELL,

Solicitors for Defendant,

Wiener Bank-Verein,

Office & P. O. Address,

1328 Broadway,

New York City,

Borough of Manhattan.

**Allowance of Appeal of Defendant Bank.**

238

UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.  
E. 23-160.

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LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H.  
HAUSER, JOHN S. SCULLY, SIMON B. BLU-  
MENTHAL, DAVID FORSHAY and ISAAC GUTEN-  
STEIN, co-partners doing business under the  
firm name and style of Zimmermann & For-  
shay, as brokers,

Plaintiffs,

239

—against—

THOMAS W. MILLER, as Alien Property Custodian  
of the United States and FRANK WHITE, as  
Treasurer of the United States, and the  
WIENER BANK-VEREIN, of Vienna, Austria,  
Defendants.

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Upon reading the petition of defendant, Wiener  
Bank-Verein, of Vienna, Austria, for the allow-  
ance of an appeal, and on consideration of the  
assignment of errors presented therewith, it is

240

ORDERED that the appeal as prayed for be and  
it hereby is allowed, and that a certified transcript  
of the record and proceedings be forthwith trans-  
mitted to the Circuit Court of Appeals, for the  
Second Circuit, and it is

FURTHER ORDERED that the bond on appeal be  
fixed at the sum of \$250.00.

Dated, New York, September 15th, 1924.

WM. BONDY,  
U. S. D. J.



### Citation on Appeal of Defendant Bank.

241

Citation by the Honorable William Bondy,  
U. S. District Judge.

*To Leopold Zimmermann, Louis J. Rees, Maryan H. Hauser, John S. Scully, Simon B. Blumenthal, David Forshay and Isaac Gutenstein, co-partners doing business under the firm name and style of Zimmermann & Forshay, as brokers, and Thomas W. Miller, as Alien Property Custodian of the United States, and Frank White, as Treasurer of the United States—GREETING :*

242

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals, for the Second Circuit, to be holden at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, on the 15th day of October, 1924, pursuant to an allowance of appeal filed in the Clerk's office of the District Court of the United States, for the Southern District of New York, wherein the Wiener Bank-Verein, of Vienna, Austria, are appellants and you are the appellees, to show cause, if any there be, why the final decree in said allowance of appeal mentioned should not be corrected, and speedy justice should not be done in that behalf.

243

Given under my hand, at the Borough of Manhattan, City of New York, in the District and Circuit above named, this 15th day of September, in the year nineteen hundred and twenty-four, A. D., and the Independence of the United States one hundred and forty-ninth.

WM. BONDY,  
U. S. District Judge.

# **Notice of Appeal of Defendant Bank.**

244

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

E. 23-160.

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LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H. HAUSER, JOHN S. SCULLY, SIMON B. BLUMENTHAL, DAVID FORSHAY and ISAAC GUTENSTEIN, co-partners doing business under the firm name and style of Zimmermann & Forshay, as brokers,

Plaintiffs,

—against—

245

THOMAS W. MILLER, as Alien Property Custodian of the United States and FRANK WHITE, as Treasurer of the United States, and the WIENER BANK-VEREIN, of Vienna, Austria,

Defendants.

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*Sirs:*

246

PLEASE TAKE NOTICE that the above named defendant, Wiener Bank-Verein, of Vienna, Austria, hereby appeals to the Circuit Court of Appeals, for the Second Circuit, from the final decree made and entered on the 24th day of June, 1924, directing that the defendants, Thomas W. Miller, as Alien Property Custodian of the United States, and Frank White, as Treasurer of the United States, pay over to the plaintiffs from the property and money of said defendant, Wiener Bank-Verein, of Vienna, Austria, held by said Thomas W. Miller, as Alien Property Custodian of the United States, and/or Frank White, as Treasurer of the United States, the sum of Fifty thousand, nine hundred nineteen and ninety-seven hundredths dollars (\$50,919.97), with interest thereon from August 12th, 1919, at the rate of six per

*Notice of Appeal of Defendant Bank.*

cent. per annum, in the sum of Fourteen thousand seven hundred sixty-six and eighty hundredths dollars (\$14,766.80), together with the plaintiffs' costs herein as taxed at \$105.80, within ninety days after the entry of said order, and more particularly from so much of said final decree as allows the plaintiffs to recover the kronen debt in question, in currency of the United States of America, at the rate of exchange between kronen and dollars existing on August 12th, 1919, and allows the plaintiffs' interest at the rate of six per cent. per annum, from August 12th, 1919, and fails to dismiss the bill of complaint.

247

248

Dated, New York, September 16th, 1924.

Yours, etc.,

MANHEIM & WACHTELL,  
Solicitors for defendant Wiener  
Bank-Verein,  
Office & P. O. Address,  
No. 1328 Broadway,  
New York City,  
Borough of Manhattan.

To:

CLERK, UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.

249

MESSRS. STOCKTON & STOCKTON,  
Solicitors for Plaintiffs,  
2 Rector Street,  
New York City.

WILLIAM HAYWARD, ESQ.,  
Solicitor for Defendants Thomas  
W. Miller and Frank White,  
Post Office Building,  
New York City.

250 **Petition for Appeal of Defendants Miller and White.**

UNITED STATES DISTRICT COURT.

SOUTHERN DISTRICT OF NEW YORK.

E. 23-160.

LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H. HAUSER, JOHN S. SCULLY, SIMON B. BLUMENTHAL, DAVID FORSHAY and ISAAC GUTENSTEIN, co-partners, doing business under the firm name and style of Zimmermann & Forshay, as brokers,

251

Plaintiffs,

—against—

THOMAS W. MILLER, as Alien Property Custodian of the United States, and FRANK WHITE, as Treasurer of the United States, and the WIENER BANK-VEREIN of Vienna, Austria,

Defendants.

252 Now come the defendants, Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States, by their solicitor, William Hayward, Esquire, United States Attorney for the Southern District of New York, and conceiving themselves aggrieved by the decree made and entered on the 24th day of June, 1924, in the above entitled cause, do hereby appeal from the said order and decree to the United States Circuit Court of Appeals for the Second Circuit for the reasons specified in the Assignment of Errors which is filed herewith and they

*Petition for Appeal.*

pray that this appeal may be allowed and that a  
citation be issued as provided by law and that a  
transcript of the record, proceedings and papers  
upon which said order and decree were made,  
duly authenticated, may be sent to the United  
States Circuit Court of Appeals for the Second  
Circuit. 253

WM. HAYWARD,

United States Attorney for the South-  
ern District of New York, Solicitor  
for Thomas W. Miller, as Alien  
Property Custodian, and Frank  
White, as Treasurer of the United  
States. 254

Dated, New York, November 17, 1924.

256 **Assignment of Errors of Defendants Miller  
and White.**

UNITED STATES DISTRICT COURT.

SOUTHERN DISTRICT OF NEW YORK.

E. 23-160.

257 LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN  
H. HAUSER, JOHN S. SCULLY, SIMON B. BLU-  
MENTHAL, DAVID FORSHAY and ISAAC GUTEN-  
STEIN, co-partners doing business under the  
firm name and style of Zimmermann & For-  
shay, as brokers,

Plaintiffs,

—against—

THOMAS W. MILLER, as Alien Property Custodian  
of the United States, and FRANK WHITE, as  
Treasurer of the United States, and the  
WIENER BANK-VEREIN of Vienna, Austria,  
Defendants.

258 Now come the defendants, Thomas W. Miller,  
as Alien Property Custodian, and Frank White,  
as Treasurer of the United States, and file the  
following assignment of errors upon which they  
will reply upon their appeal from the decree  
made by this Honorable Court on the 24th day  
of June, 1924, in the above entitled cause.

First: That the Court erred in holding that  
the decree in this cause should be for the value  
in dollars of the marks owing to the plaintiffs  
at the rate of exchange on August 12, 1919.

*Assignment of Errors.*

Second: That the Court erred in not holding that the decree should be for the value in dollars, as of the date of the decree, of the German marks owing to the plaintiffs.

259

Third: That the Court erred in holding that the plaintiffs made a sufficient demand for the balance on deposit with the defendant, Wiener Bank-Verein, on August 12, 1919.

Fourth: That the Court erred in holding that the cable on August 12, 1919 was a sufficient demand for such balance on deposit, with said defendant bank.

260

Fifth: That the Court erred in not holding that, no sufficient demand for the balance on deposit with the said defendant bank having been made, the suit was prematurely brought.

Sixth: That the Court erred in admitting into evidence over the objection and exception of the defendants, plaintiffs' Exhibit 1 (Rec., p. 70).

Seventh: That the Court erred in ordering, adjudging, and decreeing that the defendants, the Alien Property Custodian and the Treasurer of the United States pay to the plaintiffs the sum of fifty thousand nine hundred nineteen dollars and ninety-seven cents (\$50,919.97), with interest thereon from August 12, 1919 in the sum of fourteen thousand seven hundred sixty-six dollars and eighty cents (\$14,766.80), together with the costs of this suit out of the property of the defendant alien enemies, conveyed, transferred,

261

*Assignment of Errors.*

262 assigned, delivered, or paid to or seized by the Alien Property Custodian or any of his predecessors in office, and held by the defendant, the Alien Property Custodian, or by the defendant, the Treasurer of the United States, in a trust entitled Wiener Bank-Verein.

Eighth: That the Court erred in not ordering, adjudging and decreeing that the evidence was insufficient to warrant a decree in favor of the plaintiffs.

263 Ninth: That the Court erred in not adjudging, ordering and decreeing that the bill of complaint be dismissed.

All of which is respectfully submitted.

Dated, New York, New York, the 17th of November, 1924.

WM. HAYWARD,

United States Attorney, Solicitor for  
Thomas W. Miller, as Alien Property  
Custodian, and Frank White,  
as Treasurer of the United States.



**Order Allowing Appeal of Defendants  
Miller and White.**

265

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK,

E. 23-160.

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LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H.  
HAUSER, JOHN S. SCULLY, SIMON B. BLUMEN-  
THAL, DAVID FORSHAY and ISAAC GUTENSTEIN,  
co-partners, doing business under the firm  
name and style of Zimmermann & Forshay,  
as brokers,

Plaintiffs,

266

—against—

THOMAS W. MILLER, as Alien Property Custodian  
of the United States, and FRANK WHITE as  
Treasurer of the United States, and the  
WIENER BANK-VEREIN of Vienna, Austria,  
Defendants.

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Upon reading the petition of Thomas W. Miller,  
as Alien Property Custodian, and Frank White,  
as Treasurer of the United States, dated New  
York, New York, Nov. 17, 1924, for the allowance  
of an appeal, and on consideration of the Assign-  
ment of Errors presented therewith, it is

267

ORDERED that the appeal as prayed for be and  
the same is hereby allowed and that a certified  
copy of the record and of proceedings be forth-  
with transmitted to the Circuit Court of Appeals  
for the Second Circuit; and it appearing that this  
appeal is taken by direction of a department of

*Citation on Appeal.*

268 the Government, to wit, the Department of Justice, it is further

ORDERED that the said appeal shall operate as a supersedeas and that no bond, obligation or security shall be required from the appellants, Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States, either to prosecute the same or to answer in damages and costs.

269 Dated, New York, New York, November 18, 1924.

HENRY W. GODDARD,  
United States District Judge.

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**Citation on Appeal of Defendants Miller and White.**

By the HONORABLE HENRY W. GODDARD, One of the United States District Judges for the Southern District of New York, in the Second Circuit.

270 *To Leopold Zimmermann, Louis J. Rees, Margan H. Hauser, John S. Scully, Simon B. Blumenthal, David Forshay and Isaac Gutenstein, co-partners, doing business under the firm name and style of Zimmermann & Forshay, as brokers—GREETING:*

YOU ARE HEREBY CITED and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden

*Citation on Appeal.*

at the Borough of Manhattan in the City of New York, in the District and Circuit above named on the 17th day of December, 1924, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of New York, wherein Thomas W. Miller, as Alien Property Custodian of the United States, and Frank White, as Treasurer of the United States, and the Wiener Bank-Verein of Vienna, Austria, are appellants, and you are appellees to show cause, if any there be, why the decree in said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

271

272

GIVEN UNDER MY HAND at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 18th day of November, in the year of our Lord One Thousand Nine Hundred and twenty-four, and of the Independence of the United States the One Hundred and Forty-ninth.

HENRY W. GODDARD,  
United States District Judge  
for the Southern District of New York,  
in the Second Circuit.

273

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274 **Notice of Appeal of Defendants Miller and White.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

E. 23-160.

275

LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H. HAUSER, JOHN S. SCULLY, SIMON B. BLUMEN-THAL, DAVID FORSHAY and ISAAC GUTENSTEIN, co-partners, doing business under the firm name and style of Zimmermann & Forshay, as brokers,

Plaintiffs,

—against—

THOMAS W. MILLER, as Alien Property Custodian of the United States, and FRANK WHITE as Treasurer of the United States, and the WIENER BANK-VEREIN of Vienna, Austria,  
Defendants.

*To the Clerk of the United States District Court  
for the Southern District of New York.*

276

MESSRS. STOCKTON & STOCKTON,

2 Rector Street,

Borough of Manhattan, New York,

Solicitors for Plaintiffs.

PLEASE TAKE NOTICE that Thomas W. Miller, as Alien Property Custodian and Frank White, as Treasurer of the United States of America, do hereby appeal to the Circuit Court of Appeals for

*Notice of Appeal.*

the Second Circuit from the final decree made and entered on the 24th day of June, 1924, and from each and every part of said decree. 277

Dated, New York, New York, November 17, 1924.

WM. HAYWARD,  
United States Attorney for the  
Southern District of New York.  
Solicitor for Thomas W. Miller,  
as Alien Property Custodian,  
and Frank White, as Treasurer  
of the United States. 278

**Testimony.**

280

**UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.  
In Equity 23-160.**

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LEOPOLD ZIMMERMAN, LOUIS J. REES, M. MAX H.  
HAUSER, JOHN S. SCULLY, SIMON B. BLUMEN-  
THAL, DAVID FORSHAY and ISAAC GUTENSTEIN,  
co-partners doing business under the firm  
name and style of Zimmerman and Forshay,  
as brokers,

Plaintiffs,

281

—against—

THOMAS W. MILLER, as Alien Property Custodian,  
FRANK WHITE, as Treasurer of the United  
States, and the WIENER BANK-VEREIN of  
Vienna, Austria,

Defendants.

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Before—HONORABLE JOHN C. KNOX,  
*District Judge.*

New York, November 21st, 1923.  
2:00 P. M.

282

APPEARANCES:

STOCKTON & STOCKTON (Joseph M. Hartfield and  
Hamilton Vreeland, Jr., Counsel), Solicitors  
for Plaintiffs,

WILLIAM HAYWARD, U. S. Attorney (Thomas J.  
Crawford, Assistant U. S. Attorney, Counsel),  
Solicitor for Defendants Miller and White.

MANHEIM & WACHTELL, Solicitors for Defendant  
Wiener Bank-Verein of Vienna, Austria.

MARYAN H. HAUSER, called as a witness in  
behalf of the plaintiffs, being first duly sworn, 283  
testifies as follows:

*Direct examination by Mr. Hartfield:*

Q1. What is your full name and your place of residence? A. Maryan H. Hauser, 237 East 120th Street, Rockaway Park, New York City.

Q2. Are you a member of the firm of Zimmerman & Forshay? A. Yes, sir.

Q3. Who are the other partners in the firm? A. Leopold Zimmerman, Louis J. Rees, John S. Scully, David Forshay, Samuel P. Blumenthal and Isaac Gutenstein. 284

Q4. The members of that firm are the plaintiffs in this suit? A. Yes, sir.

Q5. Were these same partners under the firm name of Zimmerman & Forshay on April 6, 1917, and on October 1st, 1917? A. Yes, sir.

Q6. How long has the present personnel of the firm of Zimmerman & Forshay continued? A. Since January 1, 1917.

Q7. And at that time how was the firm changed? A. Gutenstein and Mr. Forshay were admitted to the firm.

Q8. Did all of the former partners continue to be partners after the admission of these two new members on January 1, 1917? A. Yes, sir. 285

Q9. How long had the firm of Zimmerman & Forshay, as it existed on December 31, 1916, been in existence? A. Since March, 1881.

Q10. And had that firm which was formed in March, 1881, succeeded to any other firm doing business in the City of New York? A. It succeeded the firm of Zimmerman, Walsh & Company.

*Margan H. Hauser—for Plaintiffs—Direct.*

286 Q11. When was Zimmerman, Walsh & Company first formed? A. I think in 1874.

Q12. So that it has been continuously in business in this city for about fifty years? A. Yes, sir.

Q13. Was Mr. Zimmerman, of the firm of Zimmerman & Walsh, the same Mr. Zimmerman who is now connected with your firm? A. Yes, sir.

287 Q14. What was the business of the firm, particularly its business on or about January 1, 1917, continuing to and including April 5, 1917? A. General brokerage, stock exchange business, foreign exchange, specie, and so on.

Q15. It did business during all the period you have told us about in the City of New York? A. Yes, sir.

Q16. Where was its office in 1917? A. 9 and 11 Wall Street.

Q17. Where is its place of business now? A. 170 Broadway.

Q18. What part of the business did you have to do with? A. Foreign correspondence.

Q19. You had to do with the foreign department? A. Yes, sir.

288 Q20. Did your firm specialize in foreign exchange and foreign moneys? A. Yes, sir, quite extensively.

Q21. And as a member of the firm, was it part of your business to become familiar with, and were you in fact familiar with the rates of exchange prevailing in the City of New York between Austrian kronen and United States dollars in the month preceding the 6th day of April, 1917? A. Yes, sir.

Q22. Were any of the partners that you have mentioned at any time between April 6, 1917,



*Margan H. Hauser—for Plaintiffs—Direct.*

and August 1, 1919, in any enemy country, any country occupied by an enemy or an ally of an enemy? A. No, sir. 289

Q23. Where were they during all that period? A. Right here in New York City.

Q24. All of the partners were continuously in the United States of America, in the City of New York, during the period of America's participation in the war? A. Yes, sir.

Q25. Are your partners American citizens? A. Yes, sir, all of them.

Q26. Are you an American citizen? A. Yes, sir. 290

Q27. And were you such an American citizen during all the period of our participation in the war? A. Yes, sir.

Mr. Crawford: I may say, Mr. Hartfield, the Government will not raise any question about that.

Mr. Hartfield: I know that, but it is just a formal thing.

Q28. Are all of your partners, including yourself, more than 21 years of age? A. Yes, sir.

Q29. Were you, or any of your partners, during the period of the war, either an officer, official, agent or an agency of any enemy or an ally of an enemy? A. No, sir. 291

Q30. Do you know an institution that did business in the City of Vienna in the country of Austria known as the Vienna Bank Verein? A. Yes, sir.

Q31. Did your firm do business with that bank? A. Yes, sir.

Q32. Is that a State bank or is it a privately owned bank? A. I think it is a privately owned bank.

*Maryan H. Hauser—for Plaintiffs—Direct.*

292 Q33. But it was one of the large banking institutions in Vienna? A. Yes, sir.

Q34. Did you have a deposit account with that firm? A. Yes, sir.

Q35. Did you have such an account on the 6th day of April, 1917? A. Yes, sir.

Q36. Do you know a Mr. Pollock, who was an officer of that bank? A. Yes, sir, director Oscar Pollock.

Q37. You say he was a director of that institution? A. And he is today.

Q38. He is today? A. Yes, sir.

293 Q39. You say director of a foreign bank such as the defendant, Vienna Bank Verein, are directors there active officers? A. Yes, sir.

Q40. And a director of a bank such as the Vienna Bank-Verein has duties similar to a president or vice-president of a New York Banking institution? A. Yes, sir, that is my understanding.

Q41. Are you familiar with the signature and handwriting of Mr. Pollock, who was a director of the defendant bank, and who is now a director of the defendant bank? A. I know Mr. Pollock's signature.

294 Q42. Will you please look at that paper and tell us if that is his signature (handing paper to the witness)? A. Yes, that is his signature.

Q43. Is this a letter received by Zimmerman & Forshay in the mail in due course from Vienna on April 23, 1920, the latter being dated April 1, 1920? A. Yes, sir, received here on April 23, 1920.

Mr. Hartfield: I ask to have this marked for identification.

*Margan H. Hauser—for Plaintiffs—Direct.*

(Marked Plaintiffs' Exhibit 1 for Identification.)

295

Q44. I call your attention to the statement contained in this letter from Plaintiffs' Exhibit 1 for Identification, that "Your pre-war balance held with us as per April 6, 1917, namely, kronen, 3,313,799.03," and ask you if that is the correct amount of the balance due from that institution to you or whether the amount owed to you is less than that sum?

Mr. Crawford: If your Honor please, I want to register an objection. I do not think the question is proper because the paper is not yet in evidence.

296

Mr. Hartfield: I offer it in evidence.

Mr. Crawford: I object to its going into evidence on the ground that it is an attempt to state an account after April 6, 1917.

The Court: I will take it for what it shows itself to be.

Mr. Crawford: Your Honor will allow me an exception?

The Court: Yes.

297

*By Mr. Hartfield:*

Q45. Will you answer the question? A. The amount is less than what this letter says.

Q46. Will you explain why that is? A. This included a transaction of 1,250,000 kronen which we purchased from the representative of the Wiener Bank-Verein in New York and because his cable was not forwarded in time, we cancelled that transaction with him.

Q47. When was this purchase made, before

*Margan H. Hauser—for Plaintiffs—Direct.*

298 America's entrance into the war? A. A few days before.

Q48. And because of the failure to get that cable through, you cancelled it, so deducting 1,250,000 kronen from that balance, what is the amount? A. 2,063,799.03 kronen.

Q49. Has that sum, or any part of it, ever been paid to you? A. No, sir.

299 Q50. Will you tell us, based upon your experience as a dealer in foreign exchange, what was the average rate for kronen in the month immediately preceding the 6th day of April, 1917, the average rate for the month? A. 11.18.

Q51. Have you translated into dollars at 11.18, the number of kronen which you just testified about, namely, 2,063,799.03? A. Yes, sir.

Q52. What do you make that amount? A. I make that in dollars, \$230,732.73.

Q53. Did you cause to be filed on behalf of your client on or about December 15, 1920, notice of the claim with the Alien Property Custodian? A. Yes, sir.

Mr. Hartfield: Have you got that file?

Mr. Crawford: That will be conceded.

300 Mr. Hartfield: I assume, your Honor, without marking it, it being a file paper of the Alien Property Custodian, that the claim filed will be deemed to have been offered in evidence?

Mr. Crawford: No objection.

Mr. Hartfield: And that we may submit to your Honor a copy, first submitting it to the attorney for the Alien Property Custodian?

(Marked Plaintiffs' Exhibit 2.)

*Margan H. Hauser—for Plaintiffs—Cross.*

Q54. Have you computed the interest on that amount from April 1, 1917, to date? A. Mr. Baenziger has it. 301

Q55. Does the amount referred to in that letter of the defendant bank, less this item of 1,250,000 kronen, represent the transaction which was not completed just prior to April 6, 1917; is that the same amount as appears on the books of Zimmerman & Forshay to be due from the defendant company?

Mr. Crawford: I object to that on the ground that the books are the best evidence. 302

*Cross examination by Mr. Crawford:*

XQ56. Mr. Hauser, you have no personal knowledge of the amount that you claim the plaintiffs have against the Wiener Bank, have you? A. I have personal knowledge from what our books show.

XQ57. Then on what did you base your statement to Mr. Hartfield that the amount represented in that letter is correct? A. It is not correct, I beg your pardon.

XQ58. Except with the slight exception that you mentioned? A. That this amount agrees with our books. 303

XQ59. Did you compare it? A. Yes, sir.

XQ60. Did your company ever make a demand upon the Wiener Bank prior to April 6, 1917, for the payment of this balance? A. Prior to April 6?

XQ61. Yes. A. No, sir.

Mr. Hartfield: Your Honor understands that the Bank in its answer admits

*Margan H. Hauser—for Plaintiffs—Cross.*

304

the amount as we allege in our complaint as being due from the Bank, and I understood from Mr. Stanley that while he wanted us to make formal proof of the complaint, that he had no information that the amount was incorrect.

The Court: Do you require them to produce their books to show what their books indicate as coming to them?

305

Mr. Crawford: Mr. Stanley was called to Washington last night. I understood from him that we did not stand on technical proof, but on the other hand, we did want some evidence to show what this balance was, and competent evidence. I do not think the witness's statement that the amount compares with the books measures up to that.

The Court: I do not suppose the books will show anything different.

*By Mr. Crawford:*

306

XQ62. Have you compared the books of the company in connection with this account? A. At the time we filed our claim with the Alien Property Custodian, we made it up from our books, and it agrees with their letter which they admit except that 1,250,000.

XQ63. It is exact as to that amount? A. Yes, sir, to the penny.

Mr. Crawford: Then, if your Honor please, I will not insist upon it.

*Maryan H. Hauser—for Plaintiffs—Re-direct.*

*Re-direct examination by Mr. Hartfield:*

307

RDQ64. Do you know Mr. Von Fest? A. Yes, sir.

RDQ65. Do you know his full name? A. I do not know his first name.

RDQ66. What is his business in this country? A. He is representative of the Wiener Bank-Verein in New York.

RDQ67. When did he first come to New York? A. Long before the war.

RDQ68. Was he here in the months of January, February, March and April of 1917? A. Yes, sir.

308

RDQ69. And did he continue here after that time? A. Yes, sir.

RDQ70. Did you, in your business with the Wiener Bank-Verein, frequently come in contact with him? A. Yes, sir.

RDQ71. And did you transact business with him on behalf of the Wiener Bank-Verein? A. Yes, sir.

RDQ72. What was the nature of the business you transacted with him? A. We bought exchange from him which we received from the Wiener Bank-Verein. We credited and paid him the dollars or paid them to some institution he named.

309

RDQ73. In other words, he gave you instructions on behalf of the Wiener Bank-Verein both with respect to matters appearing on the debit and credit side of this account? A. Some of them, yes, sir.

Mr. Hartfield: If your Honor please, I will put Mr. Baenziger on to prove this computation.

310 BRUNO BAENZIGER, called as a witness in behalf  
of the plaintiffs, having been first duly sworn,  
testifies as follows:

*Direct examination by Mr. Hartfield:*

Q1. This notice of claim, which will be treated  
as Exhibit 2, is produced by the Alien Property  
Custodian. It is dated December 13, 1921, and  
shows that it was received and entered in the  
Bureau of Law Registry of Claims, Book 2, page  
113, December 21. Mr. Baenziger, you are em-  
ployed by Zimmerman & Forshay, the plaintiff in  
this case? A. Yes, sir.

311 Q2. You knew the nature of their business in  
1917 and prior thereto? A. Yes, sir.

Q3. What was the business they were engaged  
in? A. In the brokerage business and foreign  
exchange.

Q4. Did they specialize in currency of foreign  
countries and in foreign exchange? A. Yes, sir.

Q5. You knew that they had an account with  
the Wiener Bank-Verein, the defendant bank, in  
Vienna, in the country of Austria? A. Yes, sir.

312 Q6. Do the books of Zimmerman & Forshay  
show a balance in its favor as of the 6th day of  
April? A. Yes, sir.

Q7. Did you have anything to do with the  
bookkeeping on the 6th day of April, 1917? A.  
Not with that account.

Q8. But you have since examined it? A. Yes,  
sir.

Q9. Are you able to state whether or not the  
amount as appears upon the books of Zimmerman  
& Forshay is in all respects the same as the  
amount set forth in Plaintiffs' Exhibit 1, the



*Bruno Baenziger—for Plaintiffs—Direct.*

letter from the defendant bank, except as to this 313  
item of 1,250,000 kronen? A. Yes, sir.

Q10. Have you now computed interest at six per cent. from the 6th day of April, 1917, upon the sum of \$230,732.73, the equivalent at 11.18 cents in United States currency for each Austrian kronen upon 2,063,799.03 kronen? A. The interest at the rate of six per cent. amounts to \$90,601.05.

Q11. And adding that to the principal, making a total of what? A. \$321,333.78.

Q12. Have you also computed the interest at the rate of five per cent. per annum? A. The 314  
interest amounts to \$75,500.88.

Q13. And principal? A. \$306,233.61.

Q14. That is the total, is it? A. That is the total, together.

Q15. That is, adding the principal and interest makes that total? A. Yes, sir.

Q16. The interest you have computed down to date? A. As of Monday.

Q17. Which is the 19th? A. Yes, sir.

Mr. Hartfield: We also want to put in evidence, your Honor, the exhibit dated 315  
June 3, 1922, being the certificate of the Secretary of State signed by Mr. Alvey A. Adee, the Assistant Secretary of State, to the effect that the United States has not given to the Government of Austria the notice contemplated by paragraph 14 of the Annex to Section 4 of the Treaty of St. Germain, and also contains the same provision in the Treaty of Versailles. It is Plaintiffs' Exhibit 9 in the other case. I

*Colloquy of Counsel.*

316 suppose we may call it the same exhibit number in this case?

The Court: We had better make it a different one in this case.

(Marked Plaintiffs' Exhibit 3.)

Mr. Hartfield: Plaintiff rests.

(*Prima facie* proofs closed.)

317 Mr. Crawford: The Government has no evidence to offer. I understand that the questions of law involved in this and the other case are to be argued at a date to be set by your Honor.

The Court: I understand that the Wiener Bank-Verein does not offer any proof as against the allegations contained in the complaint.

Mr. Hartfield: They have put in an answer in which they do not deny the amount of kronen they owe us, but they do put in issue the question of whether they should pay kronen as of the value of the date of judgment or kronen as of the value of April 6th.

318 Mr. Crawford: If your Honor please, I want to straighten out the record, that I did not object to any of this computation of interest; that is not without prejudice to our right to raise the legal question involved.

The Court: I understand. I will withhold the decree as against the Bank-Verein until the argument.

CASE CLOSED.

**Plaintiffs' Exhibit 1.**

319

**WIENER BANK-VEREIN**

Capital fully paid up and Reserves Kronen  
250 millions.

**HEAD OFFICE VIENNA**

Cable-Address: Bankverein Vienna

Agencies at  
Agram (Zagreb)  
Aussig a. /E.  
Bieltz-Biala  
Bodenbach  
Bozen  
Brunn  
Budapest  
Budweis  
Czernowitz  
Graz  
Iglau  
Innsbruck  
Jagerndorf  
Karlsbad  
Klagenfurt  
Krakau  
Lemberg  
Mahr.-Ostrau  
Marienbad  
Meran  
Olmütz  
Pardubitz  
Pilsen  
Prag  
Prossnitz  
Salzburg  
St. Polten  
Teplitz  
Teschén  
Tetschen  
Troppau  
Villach  
Wr.-Neustadt

320

321

**Agencies in Turkey:**

Constantinopel  
Smyrna

**Sp****Foreign Department**

*Plaintiffs' Exhibit 1.*

322

Received M. H. H. Apr 23 1920

Ans'd Jul 20 1920

Vienna, April 1st, 1920.

1, Schottengasse 6.

Messrs. Zimmermann & Forshay,  
New York.

Dear Sirs,

Re: Your pre-war balance with us.

323

We duly received your favour of 17th ult., contents of which had our careful attention in all its details and in reply we beg to state the following:

324

To begin with, we would point out to you that your presumption that it must have been as well known to us as it was to you, that your pre-war balance, namely your balance with us as per April 6th 1917, could not have been touched by either party and was tied up, is an erroneous one, as contrary to the regulations in Germany, there was at no time during the war or afterwards a prohibition in Austria to effect payments on behalf of Americans out of the balances kept here, and for instance, as you will have noticed from our correspondence, we never discontinued our payments to Mr. Martin Teschner, in whose favour a monthly credit had been opened by your radio of September 18th 1916.

In consequence hereof we effected, as a rule, during the whole war any payments for our American clients which had been ordered to us, and when in April 1919 postal relations were resumed, we continued the accounts kept with us without

*Plaintiffs' Exhibit 1.*

making any distinction between pre-war balances and new balances. 325

While from the details of your letter we have gained the conviction that you were really in the belief that your pre-war balance must remain intact and was subject to the provisions of the Peace-Treaty, and that only therefore, you made to us large remittances when business-relations were permitted again, notwithstanding the fact that you kept with us at that time a big old Kronen balance, we could not know this at the time and believed that your remittances had only the purpose to create a balance of new Kronen, the old Kronen kept with us having ceased to be legal tender after the restamping in March 1919. 326

As on the other hand a good many of our American clients had instructed us already in Spring and Summer 1919 to effect payments out of these old Kronen balances by exchanging same into new Kronen, we could but interpret your cable of August 15th, reading:

"Fifteenth credit Credit Suisse Zurich fivemillion old Kronen against fivemillion new Kronen stop exchange our balance into new Kronen," to mean that you wish to exchange your whole old Kronen balance with us into new Kronen, as according to our books you had no pre-war balance but only an old Kronen and a new Kronen balance. 327

With regard to your first cable to us of August 6th, reading:

"Referring to our old balance will you consent to American Alien Property Custodian paying us out of your former funds in his custody equivalent in dollars at March fifteenth nineteen

*Plaintiffs' Exhibit 1.*

328 seventeen rate of eleven eighteen stop if you agree wire us to that effect and we will send you necessary papers to be filled out and signed by you stop this will obviate lawsuit which we otherwise be compelled to institute."

we beg to call your attention to the fact that same was absolutely incomprehensible to us, as at that time, we never thought it possible that the Peace Conference would demand that pre-war balances will have to be settled at the pre-war rate of exchange.

329 We, therefore, could not grasp the meaning of your message and cabled you on August 12th in reply as follows:

"Your cable regarding our consent to custodian incomprehensible wire details and reasons and transactions concerned,"

to which cable we never received a reply from you, and strange to say you omitted also to mention same in your favour of February 17th 1920 in which you gave the entire history of the transaction.

330 For your guidance we beg to hand you enclosed copy of our respective cable-confirmation of August 12th 1919.

If you would have answered to this cable, giving us the explanations required, no misunderstanding with regard to the exchange of your pre-war balance could have taken place, and, therefore, you cannot blame us for same now.

As the situation is at present, we are much to our regret not in a position to comply with your wishes and to reverse all our entries in order to re-establish the balance of April 1917, the whole

*Plaintiffs' Exhibit 1.*

account being in a great mix-up and all entangled, a great many of your pre-war orders having been executed against your German-Austrian Kronen account and a good many after-war orders having been effected against your old Kronen account, so that it is very hard to ascertain now which is which.

331

Besides we would mention in case your old Kronen balance with us would *not* have been exchanged into new Kronen, we would have had to deposit same with the Local Law Court, here, so as to protect us against any possible claim against us, as according to § 1425 of the Civil Law Code a debtor in this country is entitled to liberate himself of any debt by depositing the amount involved with the Local Law Court as trustee.

332

This has been done by us and by *all* banks, here, with regard to all balances which have not been exchanged with the consent of the owner and in this case your funds would have been tied up and you would have had to deal with the Local Law Court instead of with us.

As it transpires, however, from your lines that you absolutely insist upon re-establishing your pre-war balance with us in order to file your claim against us, we have made up our mind to comply with your wishes in such a way as to take the amount of your pre-war balance held with us as per April 6th 1917, viz.

333

*K 3,313,799.03*

to exchange this amount into old (unstamped) Kronen and to deposit same now with the Local Law Court here on your behalf, *debiting* you at the same time for its par value on your *German-*

*Plaintiffs' Exhibit 1.*

334 *Austrian Kronen account with us Value April 1st 1920.*

You will understand that you compelled us to do this for our own protection in view of the standpoint you took in this matter. We deemed it, however, advisable to inform you hereof by our to-day's cable reading as follows:

335 "Yours February seventeenth depositing your prewar balance per April sixth 1917 old Kronen threemillions threehundredthirteenthousandsevenhundredninetynine with local lawcourt as trustee debiting thereagainst newkronen account same amount letter follows."

for the cost of which we are *debiting* you with

*K 1.075.—Value April 1st*

on your *German-Austrian Kronen account.*

Much as we would like to maintain with you the pleasant business-relations, which always existed between us, and though we feel with pleasure disposed to be of assistance and service to you, whenever possible, you will understand that we would jeopardize our own interest, if we would comply with your request and sign the  
336 two forms of assent which you intend to send to us in order to be in a position to file an amended claim against us.

Do you really think that we ought to be made responsible for the war and the depreciation of the Kronen currency?

Should you, however, after receipt of this letter and reconsideration of the foregoing change your standpoint and prefer to leave the matter as it was before we made the deposit to the court, we would feel gladly disposed to recall the



*Plaintiffs' Exhibit 2.*

amount involved from the Local Law Court on 337  
 your behalf, re-exchange it again into new Kronen  
 and credit your German-Austrian Kronen ac-  
 count again.

We would do this, however, only upon your  
 special instructions to this effect and are enclos-  
 ing for this purpose a letter addressed to the  
 Local Law Court where your money is deposited,  
 authorizing us to withdraw the funds from them  
 in your favour. Therefore, should you think it  
 desirable please sign the enclosed letter and re-  
 turn it to us with the necessary instructions so  
 as to enable us to do the needful and to act on 338  
 your behalf.

Trusting to receive from you soon a favour-  
 able reply on the subject, we beg to remain, Dear  
 Sirs,

Yours very truly,

WIENER BANK-VEREIN.

2 enclos.

Registered

(Two signatures)

---

**Plaintiffs' Exhibit 2.**

ALIEN PROPERTY CUSTODIAN 339  
 Notice of Claim Pursuant to Section 9 of  
 "Trading With the Enemy Act."

INSTRUCTIONS.

Notice of claim, under oath, must be executed  
 in duplicate by claimant and filed with the Alien  
 Property Custodian, attention of Bureau of Law,  
 Washington, D. C.

*Plaintiffs' Exhibit 2.*

340 If claimant makes application to the Attorney General, in pursuance of sec. 9 of the "Trading with the enemy Act," and the Presidential Executive Orders thereunder, for the payment, conveyance, transfer, assignment, or delivery to said claimant of money or other property held by the Alien Property Custodian, he must append to his application to the Attorney General a sworn copy of this notice of claim.

Each individual claim must be presented on a separate form.

341 Section 2 of the "Trading with the enemy Act" defines "enemy" and "ally of enemy" as follows:

"Sec. 2. That the word 'enemy,' as used herein, shall be deemed to mean, for the purposes of such trading and of this act—

342 "(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

"(b) The government of any nation with which the United States is at war or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof.

*Plaintiffs' Exhibit 2.*

“(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term ‘enemy.’” 343

“The words ‘ally of enemy,’ as used herein, shall be deemed to mean—” 344

“(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation which is an ally of a nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of such ally nation, or incorporated within any country other than the United States and doing business within such territory.” 345

“(b) The government of any nation which is an ally of a nation with which the United States is at war, or any political or municipal subdivision of such ally nation, or any officer, official, agent, or agency thereof.

“(c) Such other individuals, or body or class of individuals, as may be natives,

*Plaintiffs' Exhibit 2.*

346 citizens, or subjects of any nation which is  
an ally of a nation with which the United  
States is at war, other than citizens of the  
United States, wherever resident or wher-  
ever doing business, as the President, if he  
shall find the safety of the United States  
or the successful prosecution of the war  
shall so require, may, by proclamation, in-  
clude within the term 'ally of enemy.' "

The Presidential Proclamation of February 5,  
1918, in pursuance of section 2 (c) of the act, in-  
347 cluded within the meaning of the word "enemy,"  
for the purpose of the "Trading with the enemy  
Act":

"All natives, citizens, or subjects of the  
German Empire or of the Austro-Hun-  
garian Empire who, by virtue of the provi-  
sions of sections four thousand and sixty-  
seven, four thousand and sixty-eight, four  
thousand and sixty-nine, and four thousand  
and seventy, of the Revised Statutes, and of  
the proclamations and regulations there-  
under, have been heretofore or may be here-  
after transferred after arrest into the cus-  
348 tody of the War Department for detention  
during the war."

Section 9 of the "Trading with the enemy Act"  
is as follows:

"Sec. 9. That any person, not an enemy,  
or ally of enemy, claiming any interest,  
right, or title in any money or other prop-  
erty which may have been conveyed, trans-  
ferred, assigned, delivered, or paid to the

*Plaintiffs' Exhibit 2.*

alien property custodian hereunder, and 349  
held by him or by the Treasurer of the  
United States, or to whom any debt may be  
owing from an enemy, or ally of enemy,  
whose property, or any part thereof, shall  
have been conveyed, transferred, assigned,  
delivered, or paid to the alien property  
custodian hereunder, and held by him or  
by the Treasurer of the United States, may  
file with the said custodian a notice of his  
claim under oath and in such form and con-  
taining such particulars as the said custo-  
dian shall require; and the President, if 350  
application is made therefor by the claim-  
ant, may, with the assent of the owner of  
said property and of all persons claiming  
any right, title, or interest therein, order  
the payment, conveyance, transfer, assign-  
ment, or delivery to said claimant of the  
money or other property so held by the  
alien property custodian or by the Treas-  
urer of the United States or of the inter-  
est therein to which the President shall de-  
termine said claimant is entitled: *Pro-*  
*vided*, That no such order by the President 351  
shall bar any person from the prosecution  
of any suit at law or inequity against the  
claimant to establish any right, title, or  
interest which he may have in such money  
or other property. If the President shall  
not so order within sixty days after the  
filing of such application, or if the claim-  
ant shall have filed the notice as above re-  
quired and shall have made no applica-  
tion to the President, said claimant may,

*Plaintiffs' Exhibit 2.*

352

at any time before the expiration of six months after the end of the war, institute a suit in equity in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the alien property custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if suit shall be so instituted then the money or other property of the enemy or ally of enemy, against whom such interest, right, or title is asserted, or debt claimed, shall be retained in the custody of the alien property custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant or by the alien property custodian or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant, or suit otherwise terminated.

353

354

"Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the alien property custodian shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court."

*Plaintiffs' Exhibit 2.*

The Executive Order of October 12, 1917, provides, among other things, as follows: 355

“XXXII. I vest in the Attorney General all power and authority conferred upon the President by the provision of Section 9 of the ‘Trading with the enemy Act.’”

TO FRANCIS P. GARVAN,  
Alien Property Custodian,  
Washington, D. C.

The undersigned, hereinafter referred to as claimant, desiring to take advantage of section 9 of the “Trading with the enemy Act,” hereby gives you notice of claim, as follows, and hereby agrees to furnish such other information and proof as you may require. 356

1. Name of claimant (individual, partnership, association, corporation):

Zimmermann & Forshay.

2. Address of claimant:

170 Broadway, New York City.

3. Name of enemy or ally of enemy whose property is affected by this claim: 357

Wiener Bank-Verein.

Vienna, Austria.

4. Residence or last known address of enemy or ally of enemy:

5. Name of any other persons, if known to

*Plaintiffs' Exhibit 2.*

358 claimant, who have any interest whatever in  
within claim:

None.

6. Address or addresses of such person or persons:

.....

7. If the claim, notice of which is hereby given,  
is made for certain specific property, or for an interest in property, the following questions must  
be answered:

359

(a) The said property was conveyed, transferred, assigned, or delivered to Alien Property Custodian by:

.....

Address: .....  
(No.) (Street.) (City.) (Country.)

(b) The following is an accurate description of the property affected by this notice of claim (this description must be sufficiently complete to identify the property):

360

.....

8. The nature of the claim, notice of which is hereby given, is as follows: (If the claim is for only part of the property, describe that part; if of an interest, state precisely what the interest is; if of a debt, state fully the nature thereof, how it is evidenced, and whether there are any set-offs or counterclaims. Attach verified copies of all papers relied on to support claim.)



*Plaintiffs' Exhibit 2.*

Money owed to claimant by abovementioned enemy, or ally of enemy, as follows: \$391,028.29 with interest thereon at the rate of six per centum (6%) per annum since April 6, 1917.

361

This debt arises from a pre-war balance which claimant had with abovementioned enemy or ally of enemy and which said enemy or ally of enemy now owes this claimant, figured at the rate of exchange between March 6th and April 6th, 1917, of 11.80 cents in U. S. currency for each Austrian krone.

There are no set-offs or counterclaims in favor of said enemy or ally of enemy. Evidence of this debt will be submitted in the near future.

362

The claimant represents and alleges that claimant is not an enemy or ally of enemy; that no person or persons whatsoever, except as above stated, have any interest in or lien upon the proceeds of the claim set forth in the within notice; that this notice is not filed in collusion with any enemy or ally of enemy, or any other person or persons for the purpose of avoiding the terms and provisions of the "Trading with the enemy Act"; that the claim herein referred to is in all respects bona fide, and that there are no set-offs, counterclaims, or defenses, except as herein stated.

363

Dated, December 13, 1921.

(Signature of party making claim)

(Sd) ZIMMERMANN & FORSHAY.

By MARYAN H. HAUSER, Partner.

(SEAL)

*Plaintiffs' Exhibit 2.*

- 364 (Partnerships should sign by member or duly authorized representative. Corporations or associations should sign by officer or duly authorized representative, and should affix corporate or official seal.)
- 

AFFIDAVIT OF MEMBER OR REPRESENTATIVE OF  
PARTNERSHIP MAKING CLAIM.

State of New York,  
County of New York—ss.:

- 365 I swear that I am a member of the partnership making foregoing claim, and that the foregoing statements are true and correct.

(Sd) MARYAN H. HAUSER.

Subscribed and sworn to before me  
this 13th day of December, 1921.

(Sd) ELIAS GOLDSCHMIDT,  
Notary Public,  
N. Y. Co. Clerk's No. 255.

**Plaintiffs' Exhibit 3.**

367

**DEPARTMENT OF STATE****WASHINGTON**

Address Official Communications to the Secretary  
of State, Washington, D. C.

In reply refer to  
So-763.72113/1584

June 3, 1922.

Mr. Hamilton Vreeland, Jr.,  
Care of Messrs. Stockton and Stockton,  
2 Rector Street,  
New York City, New York.

368

Sir:

In response to the inquiry contained in your letter of May 16, 1922, you are informed that the Government of the United States has not given to the Government of either Austria or Germany the notice contemplated by paragraph 14 of the Annex to Section IV (Property, Rights and Interests) of the treaties of St. Germain and Versailles, respectively.

369

This paragraph in each treaty, in substance provides that in the settlement of matters provided for in the first article of Section IV of Part X of that treaty between the particular enemy state and an Allied or Associated Power which has not given notice of its intention to adopt Section III (Debts) of the treaty, and between their respective nationals, the provisions of Section III respecting the currency in which payment is to

*Plaintiffs' Exhibit 3.*

370 be made and the rate of exchange and of interest shall apply unless the Government of the particular Allied or Associated Power concerned shall within six months of the coming into force of the treaty give notice that the said provisions are not to be applied.

I am, Sir,

Your obedient servant,

For the Secretary of State:

371 **ALVEY A. ADEE,**  
Second Assistant Secretary.

372

**Stipulation as to Transcript of Record.**

373

**UNITED STATES DISTRICT COURT,****SOUTHERN DISTRICT OF NEW YORK.****E—23-160.**


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**LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H. HAUSER, JOHN S. SCULLY, SIMON B. BLUMEN-  
THAL, DAVID FORSHAY and ISAAC GUTEN-  
STEIN, co-partners, doing business under the  
firm name and style of Zimmermann & For-  
shay, as brokers,**

**Plaintiffs,****—against—**

374

**THOMAS W. MILLER, as Alien Property Custodian  
of the United States, and FRANK WHITE, as  
Treasurer of the United States, and the  
WIENER BANK-VEREIN, of Vienna, Austria,  
Defendants.**

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IT IS HEREBY STIPULATED AND AGREED that the foregoing is a true transcript of the record of the said District Court in the above entitled suit as agreed on by the parties for the purposes of the appeals herein.

Dated, New York, November 28th, 1924.

375

**STOCKTON & STOCKTON,****Solicitors for Plaintiffs.****MANHEIM & WACHTELL,****Solicitors for Defendant Wiener Bank-Verein.****WM. HAYWARD,**

**Solicitor for Defendants Thomas W.  
Miller as Alien Property Custo-  
dian and Frank White as Treas-  
urer of the United States.**

**Clerk's Certificate.**

376

**UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.  
E—23-160.**

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LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H. HAUSER, JOHN S. SCULLY, SIMON B. BLUMENTHAL, DAVID FORSHAY and ISAAC GUTENSTEIN, co-partners, doing business under the firm name and style of Zimmermann & Forshay, as brokers,

Plaintiffs,

—against—

377

THOMAS W. MILLER, as Alien Property Custodian of the United States, and FRANK WHITE, as Treasurer of the United States, and the WIENER BANK-VEREIN, of Vienna, Austria,

Defendants.

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378

I, ALEX GILCHRIST, JR., Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of said District Court in the suit entitled Leopold Zimmermann, Louis J. Rees, Maryan H. Hauser, John S. Scully, Simon B. Blumenthal, David Forshay, and Isaac Gutenstein, co-partners, doing business under the firm name and style of Zimmermann & Forshay, as brokers, Plaintiffs, against Thomas W. Miller, as Alien Property Custodian of the United States, and Frank White, as Treasurer of the United States, and the Wiener Bank-Verein of Vienna, Austria, Defendants, as agreed on by the parties on the appeal by the plaintiffs and the cross-appeals by the defendants.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said Court at my office this 28 day of November, 1924.

ALEX GILCHRIST, JR.,

Clerk.

(Seal)

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND  
CIRCUIT

Before: Hon. Charles M. Hough, Hon. Martin T. Manton, Hon.  
Learned Hand, Circuit Judges

LEOPOLD ZIMMERMANN et al., Trading as Zimmermann & Forshay,  
Plaintiffs-appellants-appellees,

vs.

FREDERICK C. HICKS, Alien Property Custodian, FRANK WHITE,  
Treasurer of the United States, and the Deutsche Bank, Defend-  
ants-appellees-appellants

The Same

vs.

FREDERICK C. HICKS, Alien Property Custodian, FRANK WHITE,  
Treasurer of the United States, and the Wiener Bank-Verein, De-  
fendants-appellees-appellants.

OPINION

These suits, under Section 9 of the Trading with the Enemy Act, are alike in outline, were tried and argued together, and will be similarly disposed of.

Both proceedings were begun against Mr. Thomas W. Miller as Alien Property Custodian. Mr. Hicks has been substituted on appeal, he having been appointed vice Miller resigned pendent lite.

Subpoenas in each case issued February 28, 1922, and in each the plaintiffs pleaded a demand for the amount in suit made upon the Custodian pursuant to Section 8 of the Statute in December, 1921. No other demand was pleaded.

Deutsche Bank was and is a well known banking institution of Germany, and Wiener Bank did a like business in Austria. In each of these banks plaintiffs had maintained for years before the outbreak of the World War in August, 1914, a large deposit account. Though the methods in which depositors' accounts were availed of in Germany and Austria differed and differ somewhat from methods pursued in the United States, the differences existing give rise to no legal question important in these litigations.

Almost immediately after August, 1914, mail communication between America and the Central Powers became so difficult (owing to the British blockade) that there was practically no exchange of information or instruction between plaintiffs and these banks. For the purposes of these litigations the deposit accounts remained substantially intact until this country entered the War on April 6, 1917, and until the passage of the Trading with the Enemy Act.

Mail communication was resumed rather early in 1919, and the material events of that year will be stated in the opinion following.

During War with the United States the German Empire created an official (der Treuhänder) somewhat resembling the Alien Property Custodian, who, however, did not remove from Deutsche Bank the deposit of plaintiffs, but did lay a species of embargo or injunction upon any payments to or for account of plaintiffs upon said deposit. This embargo was not raised until December, 1921.

Austria never forbade any dealings with or for account of Americans during the War. In 1919 the currency or legal tender of both Germany and Austria was rapidly depreciating in exchange value and efforts (hereinafter detailed) were made by plaintiffs to reach some satisfactory utilization of their still existing deposit accounts in the two banks.

These efforts failed. As to the Wiener Bank, at some time prior to April 1, 1920, plaintiffs refused to accept the Austrian kronen on deposit with that bank to the credit of plaintiffs, who refused either the kronen in kind or United States currency at the then prevailing rate of exchange; they demanded the exchange value of kronen at the rate prevailing immediately before hostilities declared.

There then was in force a provision of Austrian statute law as follows:

"If a debt cannot be paid because the creditor is \* \* \* dissatisfied with the offer \* \* \* the debtor may deposit in court the subject matter in dispute. \* \* \* If legally carried out and the creditor has been informed thereof (this measure) discharges the debtor of his obligation and places the subject matter delivered at the risk of the creditor."

On April 1, 1920, Wiener Bank deposited the number of kronen here in suit in a Court appropriate for that purpose under the statute cited, and gave notice to plaintiffs of what it had done.

Deutsche Bank was compelled by the action of the Treuhänder to retain possession of the marks on deposit with it to the credit of plaintiffs until December, 1921, or substantially the time when these suits were suggested, although not technically begun by the filing of the pleaded notices with the Alien Property Custodian.

Plaintiffs' position throughout in both cases has been and is what they are entitled to recover the dollar value on April 6, 1917, of the German marks and Austrian kronen on deposit with the respective defendant banks.

This measure of recovery was denied below, but plaintiffs were given decrees on the theory that they had demanded payment of each of the defendant banks in August, 1919. From decrees accordingly all parties appealed.

Joseph M. Hartfield for plaintiffs;

Dean Hill Stanley for Alien Property Custodian and the Treasurer of the United States;



Thomas J. Haight and Amos J. Peaslee for Deutsche Bank;  
 Louis Manheim and Samuel R. Wachtell for Wiener Bank;  
 Spier Whitaker filed brief as *amicus curie* as to the rate of exchange applicable.

HOUGH, C. J.:

There are several matters discussed at bar as to which discussion in this court may cease; we have expressed views which will remain in force until corrected by higher authority.

War between the United States and Germany ceased on July 2nd, 1921 (Re Miller, 281 Fed., 764; c. f. Swiss National Ins. Co. vs. Miller, U. S. Sup. Ct., Feb. 2, 1925). Undoubtedly commercial relations were more or less re-established for approximately two years before that date, but that fact does not affect the material point that until July 2, 1921, a German was an alien enemy.

The date at which exchange is to be computed we have covered in Guinness vs. Miller, 299 Fed., 538, and sufficiently assigned reasons for our holding.

That the provisions of the Versailles Treaty do not affect nor relate to claims like that against the Deutsche Bank we have also held in the Guinness case, *supra*.

It is fundamental in both these suits to ascertain and declare the legal relation between plaintiffs and the defendant Banks. It was admittedly that of depositor and banker, and there is no evidence that the nature of that common relation is not the same under German, Austrian and American law.

It is therefore so plain as to need no citation in support that the relation of parties was merely that of debtor and creditor, the debt due on demand and therefore not due until demand was made; and a demand is "a requisition or request to do a particular thing specified under a claim of right on the part of the person requesting". (Bouv. Law Dic.)

It is useful next to inquire by the law of what country the mutual rights and privileges of the parties are to be determined. We have no doubt that by specific agreement the duties and obligations of the Banks were to be determined by German and Austrian law respectively. But even without such agreement, since each Bank had in effect made a contract to pay on demand and at its own banking house, the same result is reached by applying the familiar rule of the law of the place where the contract is to be performed, i. e. Germany or Austria as the case might be. (London Assurance vs. Companhia, 167 U. S., 149).

The above holding is made in both of these suits, though, as will appear, it is not from our standpoint material in respect of the Deutsche Bank, but it does greatly affect that of the Wiener Bank.

The question which most practically and very vitally affects these suits and probably many others, may be thus put: What did the Banks owe plaintiffs? In answer we think it plain that they did not owe a certain number of units of any fixed value, nor could their debts be expressed in any universal currency; they owned only cer-

tain quantities of the thing called money within that political subdivision of the world in which the Bank existed and to the laws of which it was subject. Therefore neither of these banks ever owned the plaintiffs any dollars. The only method of describing their debts is to speak of so many marks or kronen, which, like dollars, are merely legal and financial entities varying in exchange or purchasing power for reasons with which no Court has any concern and over which it has no power or authority.

Therefore all that any American Court can do is to translate a demand for marks or kronen into the dollars with which alone can we deal; and we must make that translation according to the facts as proven at a time fixed by law, and what that time is we have declared in the Guinness case, *supra*.

Since, therefore, there can be no breach of contracts such as those at bar until a demand and refusal and no assessment of damages in dollars until such demand, the question of fact is acute. When did plaintiffs make a demand upon these banks or either of them?

We may premise this inquiry by stating our agreement with the lower Court in rejecting plaintiffs' contention that their rights were created by the declaration of war on April 6, 1917, i. e. that such declaration was equivalent to a demand and refusal. We feel assured that the declaration had no such effect. Of course a declaration of war could do no more than the war itself, and that war does not affect the relations of parties to an executed contract, but merely suspends the remedies available thereunder, was fully held in *Hanger vs. Abbott*, 6 Wall., 532.

It is indeed obvious that if the results of the declaration of April 6, 1917 were what plaintiffs claim, Section 8 of the Trading with the Enemy Act is quite superfluous, for that statute creates a method of making a demand which admittedly these plaintiffs complied with and no reason for such a proceeding can be found if the declaration was in and of itself a demand by every American creditor upon every alien enemy debtor.

On this point of demand the evidence compels us to disagree with the Court below. Passing the point that no demand was pleaded other than those of December 15, 1921 on the Custodian, it is argued that plaintiffs did in legal effect make several earlier demands, viz: in March, 1919, by filing documents with the Custodian, and in August, 1919, by an interchange of letters and telegrams with both Banks.

It would serve no useful purpose to recite the lengthy statutory demands of March, 1919; suffice it to say that we are convinced that all these documents related to the property of customers or clients of Zimmermann & Forshay which had either been impounded by the German authorities or lost track of in the fog of silence which had enveloped the Austrian Bank. It is impossible to find in these documents any evidence of a demand for plaintiffs' own deposit account.

We are confirmed in this result by observing that as to each bank account, as soon as commercial relations were re-established plaintiffs expressed the desire to go on with pre-war business and maintain

their old deposit accounts; and these desires were expressed after March, 1919.

Again in August, 1919, plaintiffs sent to each Bank telegrams substantially as follows:

"Regarding our old balance will you consent that Alien Property Custodian pay out of your firm funds in his custody equivalent in dollars at March 15, 1917 rate. \* \* \* If you agree wire us to that effect and we will send you necessary papers to be filled out and signed by you. This will obviate lawsuit which we otherwise will be compelled to institute."

This was not a demand for plaintiffs' deposit accounts. It certainly, as was remarked by the Court below, lacks some of the elements of a demand. We think it lacks too many to be a demand at all. What plaintiffs were entitled to were marks or kronen payable in Germany or Austria; what they asked for was the defendants' cooperation in their getting a certain number of dollars out of the Alien Property Custodian.

In the case, therefore, of the Deutsche Bank (and here the cases of the two Banks diverge) we are constrained to the conclusion that the only demand for this deposit accounts was the one pleaded in the bill, i. e. of December 1921; so that plaintiffs can recover only the number of marks sued for and agreed upon at the rate of exchange of the date of demand, i. e. said December.

But in respect of the Deutsche Bank, that concern had a deposit account with plaintiffs in like manner and for the same purposes that plaintiffs had their deposit account in Germany. By amendment duly allowed, Deutsche Bank has pleaded this deposit as a set-off, and also similarly pleaded indebtedness arising on new and wholly different banking transactions between itself and Zimmermann & Forshay amounting to a considerable sum of money.

The Court below allowed as an offset Deutsche Bank's bank balance with Zimmermann & Forshay as the same existed on April 6, 1917; but refused to permit any further offsets through arising out of banking transactions of a somewhat similar nature.

In this we think error was committed. At law a set-off is known to be of comparatively recent statutory origin, but law derived its whole doctrine from equity, and this suit is governed by equitable principles. One of those principles is to ascertain what was due by one party to the other at the commencement of the suit, so that, generally speaking, one party should be prevented from asserting offsets arising after suit began. (*Holden vs. Gilbert*, 7 Paige, 208; *Pate vs. Gray*, F. C. 10794a.) The record does not inform us how much of defendants' offsets were due and payable on or before February 28, 1922. Therefore in the case of the Deutsche Bank the decree must be reversed and the cause remanded, with directions to strike an account as of February 28, 1922, between the parties and to grant plaintiffs recovery for whatever excess there may be in its favor,—plaintiffs' claim being, of course, liquidated at the rate of exchange of December, 1921.

In the case of the Wiener Bank the foregoing recital of facts shows

that no demand had been made prior to April 1, 1920. But there had arisen a difference of opinion as to the rate at which plaintiffs' old account would be available for exchange. Therefore, as we have held that these parties were subject to the operation of Austrian law, payment into Court of all the kronen due was a complete extinguishment of plaintiffs' demand on the Wiener Bank.

Let the decree in that case be reversed and the cause remanded, with directions to dismiss the bill. The Wiener and Deutsche Banks will recover the costs of this Court. No other costs here. The costs of the District Court are left to the discretion of that tribunal.

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IN UNITED STATES CIRCUIT COURT OF APPEALS

LEOPOLD ZIMMERMAN, et al., Plaintiffs-Appellants,

v.

FREDERICK W. HICKS, as Alien Property Custodian; FRANK WHITE, as Treasurer, etc., and WIENER BANK-VEREIN, Defendants-Appellants

JUDGMENT—Filed May 11, 1925

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is reversed with costs to the Wiener Bank-Verein, and cause remanded with instructions to dismiss the bill with costs to the Wiener Bank-Verein.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

M. T. M.

L. H.

[File endorsement omitted.]

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IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PETITION FOR APPEAL

The above named plaintiffs, Leopold Zimmermann, Louis J. Rees, Maryan H. Hauser, John S. Scully, Simon B. Blumenthal, David

Forshay and Isaac Gutenstein, respectfully show that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Second Circuit and that a final decree therein has been rendered on the 11th day of May, 1925 reversing the decree of the District Court of the United States for the Southern District of New York entered June 24, 1924, directing the dismissal of the bill of complaint with costs and directing that a mandate issue to said United States District Court in accordance with said decree.

The matter in controversy in said suit exceeds one thousand dollars besides costs.

The above entitled cause is one in which the jurisdiction of the United States Circuit Court of Appeals is not final, as the action is brought under and involves a construction of a statute of the United States, to wit: the "Trading with the Enemy Act" (40 Stat. 419), and the cause is a proper one to be reviewed by the Supreme Court of the United States on appeal.

Your petitioners are aggrieved by said decree of said United States Circuit Court of Appeals for the Second Circuit in so far as said decree reverses the decree of the District Court of the United States for the Southern District of New York, entered June 24, 1924, and directs the dismissal of the bill of complaint and does not modify said decree by directing that the kronen debt owed to the plaintiffs should be recovered by them in dollars at the average cable transfer rate of exchange for United States dollars and Austrian kronen prevailing in the United States in or about the months of March and April, 1917 or October 1st, 1918, with interest at the rate of not less than five per cent. from said date.

Wherefore your petitioners pray that an appeal be allowed them in the above cause, that a citation be issued as provided by law and that the Clerk of the United States Circuit Court of Appeals for the Second Circuit be directed to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the Assignment of Errors herewith filed by said petitioners may be reviewed and if error be found be corrected in accordance with the laws and customs of the United States.

Dated, New York, May 26, 1925.

Yours, &c., Stockton & Stockton, Solicitors for Petitioners,  
Office and P. O. Address, 2 Rector Street, Borough of Man-  
hattan, New York City.

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#### IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER ALLOWING APPEAL—May 26, 1925

Upon reading the petition of Leopold Zimmermann, Louis J. Rees, Maryan H. Hauser, John S. Scully, Simon B. Blumenthal,

David Forshay and Isaac Gutenstein, and on consideration of the Assignment of Errors presented therewith, it is

Ordered that the appeal as prayed for be and hereby is allowed and that a certified transcript of the record and proceeding be forthwith transmitted to the Supreme Court of the United States.

Henry Wade Rogers, Judge of Circuit Court of Appeals for the Second Circuit.

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IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ASSIGNMENTS OF ERROR—May 26, 1925

Come now the plaintiffs, Leopold Zimmermann, Louis J. Rees, Maryan H. Hauser, John S. Scully, Simon B. Blumenthal, David Forshay and Isaac Gutenstein, and file the following Assignments of Error upon which they will rely upon their appeal from the decree made by this Honorable Court on the 11th day of May, 1925, and say that this Honorable Court of Appeals for the Second Circuit erred as follows, to wit:

First. That the Court erred in reversing the decree of the District Court of the United States, for the Southern District of New York, entered June 24, 1924 and directing the dismissal of the bill of complaint herein.

Second. That the Court erred in holding that there had been no demand made by the plaintiffs for the repayment of the indebtedness owed them by the defendant Wiener Bank-Verein on August 6, 1919.

Third. That the Court erred in holding that plaintiffs cannot recover under Section 9 of the "Trading with the Enemy Act," unless the debt owing from the defendant to the plaintiffs was due and payable on October 1, 1917.

Fourth. That the Court erred in holding that until demand was made by plaintiffs, for the balance on deposit with defendant bank, said debt was not due and payable although it was owing to and owned by plaintiffs on October 6, 1917.

Fifth. That the Court erred in not holding that there is an account stated as of April 6, 1917, from defendant bank to plaintiffs.

Sixth. That the Court erred in not holding that there was a demand by reason of the notice of claim filed by plaintiffs with the Alien Property Custodian on March 25, 1919.

Seventh. That the Court erred in not holding that the contract of deposit was terminated and dissolved by the inception of the state of war between the United States and Austria Hungary.

Eighth. That the Court erred in not holding that the contract was terminated and dissolved by the international legal rule of non-intercourse between alien enemies, the test of alien enemy character being commercial domicile.

Ninth. That the Court erred in not holding that the contract of deposit was terminated and dissolved by the provisions of the Trading with the Enemy Act of the United States, forbidding intercourse with an "enemy" or "ally of enemy."

Tenth. That the Court erred in not holding that the kronen debt owing by defendant bank should be recovered by plaintiffs in dollars at the average cable transfer rate of exchange for United States dollars and Austrian kronen prevailing in the United States on or about April 6, 1917.

Eleventh. That the Court erred in not holding that the plaintiffs are entitled to interest on the amount of dollars specified in the 10th paragraph hereof at the rate of six per cent per annum from April 6, 1917.

Twelfth. That the Court erred in not holding that the kronen debt owing by defendant bank should be recovered by plaintiffs in dollars at the average cable transfer rate of exchange for United States dollars and Austrian kronen prevailing in the United States in or about the months of November and December, 1917.

Thirteenth. That the Court erred in not holding that plaintiffs are entitled to interest on the dollars specified in paragraph 12th hereof at the rate of five per cent per annum from April 7, 1917.

Wherefore the plaintiffs-appellant pray that said decree in said Circuit Court of Appeals be reversed and modified in the above respects, and in order that the foregoing Assignments of Error may be made a part of the record of plaintiffs-appellant present the same to said Circuit Court of Appeals and prays that such disposition may be made thereof as is in accordance with the Statutes of the United States in such manner made and provided, all of which is respectively submitted.

Stockton & Stockton, Solicitors for Plaintiffs-appellants, Office  
& P. O. Address, 2 Rector Street, Borough of Manhattan,  
City of New York.

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BOND ON APPEAL FOR \$250.00—Approved; omitted in printing

## IN UNITED STATES CIRCUIT COURT OF APPEALS

## CLERK'S CERTIFICATE

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 149 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Leopold Zimmerman, et al., Plaintiffs-Appellants, against Frederick W. Hicks, as Alien Property Custodian Frank White, as Treasurer, etc., and Wiener Bank-Verein, Defendants-Appellants, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 30th day of June in the year of our Lord One Thousand Nine Hundred and twenty-five and the Independence of the said United States the One Hundred and forty ninth.

Wm. Parkin. (Seal United States Circuit Court of Appeals,  
Second Circuit.)

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CITATION—In usual form, showing service on Mannheim & Wachtel; filed May 28, 1925; omitted in printing

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## SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION BY APPELLANTS OF PARTS OF RECORD TO BE PRINTED WITH PROOF OF SERVICE—Filed Aug. 8, 1925

Pursuant to the Revised Rules of the Supreme Court of the United States, adopted June 8, 1925, and effective July 1, 1925, plaintiffs hereby make the following designation of the portions of the record to be printed in the transcript, and the following statement of points to be relied upon by them herein:

I. Designation of portions of record to be printed:

- (1) That part of the record which was printed for use in the Circuit Court of Appeals for the Second Circuit.
- (2) Final decree of the Circuit Court of Appeals, dated May 11, 1925.
- (3) Opinion of the Circuit Court of Appeals.
- (4) Plaintiffs' petition for appeal.
- (5) Plaintiffs' assignments of error.
- (6) Order allowing plaintiffs' appeal.
- (7) Citation on appeal by plaintiffs.



II. Statement of points to be relied upon.

A. At common law plaintiffs are entitled to recover the Kronen deposit owed, calculated in dollars at:

1. The pre-war rate of exchange with interest, because:

1. There was an account stated;
2. There was a demand upon the Alien Property Custodian under the Trading with the Enemy Act in March, 1919;
3. The contract of deposit was terminated and dissolved by
  - a. The inception of a state of war between the United States and Austria-Hungary;
  - b. The international legal rule of non-intercourse between alien enemies;
  - c. The provisions of the Trading with the Enemy Act forbidding intercourse with an "enemy" or "ally of enemy."

II. The August 12, 1919, rate of exchange because the plaintiffs then demanded said sum of the defendant bank.

B. Under treaties plaintiffs are entitled to recover the Kronen deposit owed, calculated in dollars at the pre-war rate of exchange, together with interest thereon.

Charles W. Stockton, Stockton & Stockton, Solicitors for Plaintiffs, Office & Post Office Address, 2 Rector Street, New York City.

To William R. Stansbury, Esq., Clerk of the Supreme Court of the United States, Washington, D. C.

Manheim & Wachtel, Esqs., Solicitors for Wiener Bank Verein, 1328 Broadway, New York City.

Hon. Emory R. Buckner, U. S. Attorney, Solicitor for Defendants Frederick C. Hicks and Frank White, Post Office Building, New York City.

[File endorsement omitted.]

Endorsed on cover: File No. 31351. U. S. Circuit Court of Appeals, Second Circuit. Term No. 628. Leopold Zimmermann, Louis J. Rees, Maryan H. Hauser, John S. Scully, et al., Appellants, vs. Frederick C. Hicks, as Alien Property Custodian of the United States; Frank White, as Treasurer of the United States; and the Wiener Bank-Verein, of Vienna, Austria. Filed July 24, 1925. File No. 31351.

Office Supreme Court, U. S.  
FILED

FEB 17 1927

WM. R. STASSBURY  
CLERK

IN THE  
**Supreme Court of the United States,**

OCTOBER TERM—1926.

No. 180.

LEOPOLD ZIMMERMANN, *et al.*, co-partners doing  
business under the firm name and style of Zimmer-  
mann & Forshay, as brokers,

*Plaintiffs-Appellants,*

—against—

HOWARD SUTHERLAND, as Alien Property Custodian of the United States; FRANK WHITE, as Treasurer of the United States; and the WIENER BANK-VEREIN, of Vienna, Austria,

*Defendants-Appellees.*

ON APPEAL FROM THE UNITED STATES CIRCUIT  
COURT OF APPEALS, FOR THE SECOND  
CIRCUIT.

**BRIEF ON BEHALF OF APPELLANTS.**

CHARLES E. HUGHES,  
JOSEPH M. HARTFIELD,  
HAMILTON VREELAND, JR.,  
*Solicitors and Counsel for Appellants.*



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IN THE  
**Supreme Court of the United States,**

OCTOBER TERM—1926.

No. 180.

---

LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H.  
HAUSER, JOHN S. SCULLY, SIMON B. BLUMENTHAL,  
DAVID FORSHAY and ISAAC GUTENSTEIN, co-part-  
ners doing business under the firm name and style  
of Zimmermann & Forshay, as brokers,

*Plaintiffs-Appellants,*

—against—

HOWARD SUTHERLAND, as Alien Property Custodian of the  
United States; FRANK WHITE, as Treasurer of the  
United States; and the WIENER BANK-VEREIN, of  
Vienna, Austria,

*Defendants-Appellees.*

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ON APPEAL FROM THE UNITED STATES CIRCUIT  
COURT OF APPEALS, FOR THE SECOND  
CIRCUIT.

---

**BRIEF ON BEHALF OF APPELLANTS.**

---

***Report of Opinions Below.***

The opinion of the Circuit Court of Appeals, for the  
Second Circuit, is reported under the title of *Zimmer-*

*mann, et al. v. Hicks, et al.*, 7 Fed. (2nd) 443. The opinion of the United States District Court, for the Southern District of New York, is reported under the title of *Zimmermann, et al. v. Miller*, 2 Fed. (2nd) 629. Between the rendering of the opinion of the District Court and the handing down of the opinion of the Circuit Court, Thomas W. Miller ceased to be Alien Property Custodian and Frederick C. Hicks, as Alien Property Custodian, was substituted in his place as a party in this cause. During the pending of this appeal Frederick C. Hicks ceased to be Alien Property Custodian and Howard Sutherland, present Alien Property Custodian, was substituted in his place as a party appellee.

### ***The Jurisdiction of This Court.***

The judgment to be reviewed is a final judgment of the United States Circuit Court of Appeals, dated May 11, 1925, reversing the decree of the United States District Court, for the Southern District of New York (R. 132).

The cause is in the Supreme Court by virtue of an order, granted on May 26, 1925, allowing the plaintiffs' petition for appeal (R. 133). The plaintiffs in the District Court will, for clarity, be referred to in this brief as plaintiffs and the defendants in that Court will, for the same reason, be referred to here as defendants.

The statutory provisions under which the jurisdiction of the Supreme Court is invoked are found in Section 240 of the Judicial Code, as it stood on May 11, 1925, the date of the filing of the judgment below (36 Stat. L. 1157).

### ***Statement of the Case.***

This suit was brought by the plaintiffs under Section 9 of the Trading with the Enemy Act to establish a debt owing to them by the defendant Wiener Bank-Verein. The case came on for trial before Honorable John C. Knox, District Judge, who on June 24, 1924, rendered a decree in favor of plaintiffs and against the defendants, Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States, and the Wiener Bank-Verein to the effect that the said Wiener Bank-Verein was indebted to the plaintiffs in the sum of \$50,919.97, being 2,063,799.03 kronen converted into United States currency at the August 12, 1919, rate of exchange.

All of the parties to the suit appealed to the United States Circuit Court, for the Second Circuit, the plaintiffs appealing on the ground that the rate of exchange at which the said debt of 2,063,799.03 kronen should be converted into United States currency is the pre-war rate of exchange as it existed for the month prior to April 6, 1917, that is, 11.18 cents per krone, which would amount to \$230,732.73, with interest thereon from April 6, 1917. The Circuit Court reversed the decree of the District Court and in effect dismissed the bill of complaint.

### ***The Pleadings.***

The bill of complaint, as amended by stipulation, after alleging the formal facts of the plaintiffs' partnership, and the capacity in which the various defendants are sued, further alleges that the suit is brought in equity under the provisions of the Trading with the Enemy

Act; that certain property was conveyed, transferred, assigned, delivered or paid to the Alien Property Custodian or seized by him or by the Treasurer of the United States on the ground that it was the property of the defendant Wiener Bank-Verein, which was an "enemy" or "ally of enemy"; that the proceeds of the said property continued to remain with the Alien Property Custodian and/or the Treasurer of the United States; that on or about April 6, 1917, the defendant Wiener Bank-Verein was indebted to the plaintiffs in the sum of 2,063,799.03 kronen; that said sum was due and owing on April 6, 1917, and is now due and owing at the average cable transfer rate of exchange for United States dollars and Austrian kronen prevailing in the United States in or about the months of March and April, 1917, that is, at the rate of 11.18 cents for each Austrian krone, namely, \$230,732.73, which sum the defendant bank retains and although demanded, refuses to pay; that on or about March 25, 1919, and December 15, 1921, the plaintiffs duly filed notices of their claim for this amount with the Alien Property Custodian and that the property is subject to any decree which may be rendered in this suit (R. 13-21).

The relief for which the plaintiffs pray is that the Alien Property Custodian or the Treasurer of the United States, as the case may be, be directed and ordered to pay to the plaintiffs, the sum of \$230,732.73 with interest from the 6th day of April, 1917, out of any property and the income thereon which the Alien Property Custodian or the Treasurer of the United States has in his possession, and which was taken over as belonging to the defendant bank.

The answer of the Wiener Bank-Verein admits the allegations of the bill of complaint relating to the deposit

and the seizure by the Alien Property Custodian, as well as the formal allegations. It denies that the deposit was due and owing to the plaintiffs at the average cable transfer rate of exchange for United States dollars and Austrian kronen prevailing in the United States in or about the months of March and April, 1917; it denies the amount in dollars which the plaintiffs claim is due to them and it denies any knowledge or information sufficient to form a belief as to the jurisdiction of the Court (R. 28-29).

It then proceeds to set forth as a first defense, that an agreement between the plaintiffs and the defendant Wiener Bank-Verein, on which their mutual relations were based, provided that the law of Austria should apply; that prior to the time when their relations began, the Austrian law provided that where a debt could not be paid because the creditor was unknown, absent or dissatisfied with the offer made, the debtor might deposit the subject-matter of the debt in court, notify his creditor of his action and thereupon become discharged of the debt; that the plaintiffs after April 6, 1917, and prior to the commencement of this suit refused to accept the return of the sum in kronen at the then prevailing rate; that thereupon the defendant Wiener Bank-Verein deposited these kronen with the local law court designated for that purpose and gave written notice of such deposit to the plaintiffs; and that by reason thereof, it became discharged and released of the debt (R. 30-31).

It also sets up a second defense, to the effect that the plaintiffs established this kronen account with the defendant Wiener Bank-Verein for the purpose of having a balance with the Wiener Bank-Verein against which the plaintiffs could sell drafts, checks and make cable and wireless transfers for the benefit of their customers;

that under such a system of banking the settlements are always made at the prevailing rate at the date of payment or settlement; that this system of international banking usage was well known both to the plaintiffs and to the defendant and that they contracted with respect to it; and that, therefore, if the plaintiffs are entitled to recover at all from the Wiener Bank-Verein, they are only entitled to recover at the rate of exchange prevailing at the date of the rendition of the judgment (R. 31-33).

The answer prays for alternative relief, namely, a dismissal of the bill of complaint upon the ground that the Wiener Bank-Verein was discharged by the payment into the Austrian Court, or that the plaintiffs receive judgment for the sum sued for, expressed in American dollars at the rate of exchange prevailing at the date of the rendition of the judgment.

The allegations of the answer of defendants Miller and White are not set forth here because there is a complete failure of proof in this regard, these defendants offering no proof at the trial.

### ***The Facts.***

The evidence before the trial Court consisted partly of oral testimony and partly of stipulations of fact made for the purposes of the suit. The facts, briefly stated, are as follows:

Plaintiffs were a long established New York firm, composed entirely of American citizens, and were brokers and bankers engaged in general brokerage, stock exchange and foreign exchange business. They specialized extensively in foreign exchange and foreign moneys (R. 95-97).



The defendant Wiener Bank-Verein is one of the large banking institutions in Vienna (R. 97-98). It is a foreign corporation, organized under the laws of the Empire of Austria-Hungary, under which it originally received its corporate charter, which has since been validated by the new government. Its principal place of business is in Vienna, Austria, and it has no branch office in the United States (R. 35-36). However, both prior and subsequent to the outbreak of war between the United States and Austria-Hungary, the defendant bank had an agent or financial representative in New York City (R. 103). The plaintiffs began their dealings with the Wiener Bank-Verein a number of years before the outbreak of the war between the United States and Austria. They maintained an account with the Wiener Bank-Verein in kronen. That account they replenished from time to time, as necessity arose, by further deposits in kronen. This kronen deposit was used by them to draw on when they made sales of kronen exchange or when they drew drafts or issued orders by letter, cable or wireless for the payment of kronen sums (R. 36).

During the time that the plaintiffs and the defendant Wiener Bank-Verein had these dealings, the Wiener Bank-Verein rendered periodic statements of account to the plaintiffs at least once in three months. These statements of account were rendered on certain printed sheets which are in German. A translation approved by counsel appears as Defendant's Exhibit A (R. 39-45). The relevant figures for each statement of account were inserted in the appropriate blank spaces which appear in the fac-simile. The plaintiffs were credited thereon with interest at  $2\frac{1}{2}$  per cent. from the date of any such statement.

The defendant bank enclosed with its periodical statements of account a blank to be signed by the plaintiffs and returned to the defendant, acknowledging the correctness of the account as stated. Also, the conditions annexed to the account as stated provided that unless claims were made within a specified time for errors in the account, the accounts would be considered to be accepted and found to be correct. Furthermore, it should be noted that the conditions attached to the statement of account were not apparently included in the original contract under which the deposit was effected.

A state of war was declared to exist between the United States and Austria-Hungary on the 7th of December, 1917. Communications between the parties were, of course, suspended during the period of hostilities and afterwards, until July 14, 1919, when communications between American and Austrian nationals again became permissible under general license of the War Trade Board of the United States.

The statements above referred to, letters of the defendant Wiener Bank-Verein, and stipulations of their counsel in this case, all show that the Wiener Bank-Verein was indebted to the plaintiffs, as of April 6, 1917, in the sum of 3,313,799.03 kronen (Plaintiffs' Exhibit 1, R. 111; Answer, par. III, R. 29; Stipulation dated December 5, 1923, par. VI, R. 37-38; Stipulation dated December 18, 1923, R. 47). However, of this sum the plaintiffs in this action only seek the amount of 2,063,799.03 kronen. The difference between these two sums represents a credit of 1,250,000 kronen due the defendant bank because of a purchase of kronen made by the plaintiffs from the New York representative of the defendant. This purchase was cancelled because the credit was not properly established and the amount

thereof, which was included (R. 99-100) in the amount stated to be due by the Wiener Bank-Verein, has been deducted from the account as stated by the Wiener Bank-Verein.

After free communication was restored on July 14, 1919, the plaintiffs demanded their balance as of April 6, 1917, at the average cable transfer rate of exchange between United States dollars and Austrian kronen prevailing in the United States during the month between November 7 and December 7, 1917, that is, at the rate of 11.18 cents for each Austrian krone (R. 37). On August 6, 1919, they sent the Wiener Bank-Verein the following cable (R. 109-110) :

“Referring to our old balance will you consent to American Alien Property Custodian paying us out of your former funds in his custody equivalent in dollars at March fifteenth nineteen seventeen rate of eleven eighteen STOP if you agree wire us to that effect and we will send you necessary papers to be filled out and signed by you STOP this will obviate lawsuit which we otherwise will be compelled to institute.”

The Wiener Bank-Verein disputed the right of the plaintiffs to exact such a rate of exchange, and on or about April 1, 1920, it deposited in the Circuit Court of Vienna the number of kronen stated to be due and owing to the plaintiffs as of April 6, 1917 (R. 37-38). Thereafter the Wiener Bank-Verein wrote to the plaintiffs, giving them notice of the deposit (R. 38).

On the resumption of intercourse between the United States and Austria in 1919 plaintiffs forwarded new remittances to the defendant Wiener Bank Verein for the

purpose of protecting the pre-war orders which were in the mail at the outbreak of hostilities. It is apparent from reading Plaintiffs' Exhibit 1 (R. 108-113), which was a letter addressed to the plaintiffs by the defendant bank under date of April 1, 1920, that plaintiffs assumed that their pre-war balance was tied up as a result of war measures adopted by Austria and that it would be necessary to make new remittances for the protection of outstanding checks and drafts (R. 108-109). On reading the entire letter of April 1, 1920 (Plaintiffs' Exhibit 1), it is further apparent that the plaintiffs did not intend to ask the defendant bank to transform their old pre-war balance into new kronen, as claimed by the defendants. We submit that, when read in the light of the admitted fact that the plaintiffs had regarded the pre-war balance as already tied up by prohibitory regulations of Austria, and that upon learning that the defendant bank had exchanged the entire pre-war balance into new kronen the plaintiffs insisted on the re-establishment of the pre-war balance in old kronen, it is clear that the cable of August 15th, 1919 (R. 109), was not a direction to transfer the pre-war balance into new kronen.

### ***Assignment of Errors.***

The assigned errors which the plaintiffs intend to urge are as follows: That the Court erred,

*First.* In reversing the decree of the District Court of the United States, for the Southern District of New York, entered June 24, 1924, and in directing the dismissal of the bill of complaint herein.

*Second.* In holding that there had been no demand made by the plaintiffs, for the repayment of the indebted-

edness owed them by the defendant Wiener Bank-Verein, on August 6, 1919.

*Third.* In holding that plaintiffs cannot recover under Section 9 of the "Trading With the Enemy Act", unless the debt owing from the defendant to the plaintiffs was due and payable on October 1, 1917.

*Fourth.* In holding that until demand was made by plaintiffs, for the balance on deposit with defendant bank, said debt was not due and payable although it was owing to and owned by plaintiffs on October 6, 1917.

*Fifth.* In not holding that there is an account stated as of April 6, 1917, from defendant bank to plaintiffs.

*Sixth.* In not holding that there was a demand by reason of the notice of claim filed by plaintiffs with the Alien Property Custodian on March 25, 1919.

*Seventh.* In not holding that the contract of deposit was terminated and dissolved by the inception of the state of war between the United States and Austria-Hungary.

*Eighth.* In not holding that the contract was terminated and dissolved by the international legal rule of non-intercourse between alien enemies, the test of alien enemy character being commercial domicile.

*Ninth.* In not holding that the contract of deposit was terminated and dissolved by the provisions of the Trading With the Enemy Act of the United States, forbidding intercourse with an "enemy" or "ally of enemy".

*Tenth.* In not holding that the kronen debt owing by defendant bank should be recovered by plaintiffs in dollars at the average cable transfer rate of exchange for United States dollars and Austrian kronen prevailing in the United States on or about April 6, 1917.

*Eleventh.* In not holding that the plaintiffs are entitled to interest on the amount of dollars specified in the 10th paragraph hereof at the rate of six per cent. per annum from April 6, 1917.

*Twelfth.* In not holding that the kronen debt owing by defendant bank should be recovered by plaintiffs in dollars at the average cable transfer rate of exchange for United States dollars and Austrian kronen prevailing in the United States in or about the months of November and December, 1917.

*Thirteenth.* In not holding that plaintiffs are entitled to interest on the dollars specified in paragraph 12th hereof at the rate of five per cent. per annum from April 7, 1917.

### ***Argument.***

The plaintiffs submit that in a suit brought under Section 9 of the Trading With the Enemy Act, to recover from the Alien Property Custodian and the Treasurer of the United States, out of property taken over by them as belonging to a specific "enemy" or "ally of enemy", a debt owing to the plaintiffs by that "enemy" or "ally of enemy", the plaintiffs are entitled to recover the debt originally expressed in kronen at a pre-war rate of exchange and in addition interest thereon from the date

of the inception of the debt. In sustaining this contention they rely first, upon the provisions of the Trading With the Enemy Act as interpreted in the light of the common law, and second, upon the Treaty of Peace between Austria and the United States.

In dealing with this question plaintiffs contend that under the Trading With the Enemy Act and under the treaty, no actual demand upon the Austrian bank was necessary because:

*A. Aside from Treaty:*

1. There was an account stated from defendant bank to plaintiffs as of April 6, 1917.

2. The contract of deposit was terminated and dissolved by (a) the inception of a state of war between the United States and Austria-Hungary, (b) the international legal rule of non-intercourse between alien enemies, (c) the provisions of the Trading With the Enemy Act forbidding intercourse with an "enemy" or "ally of enemy".

3. There was a demand upon the Alien Property Custodian under the Trading With the Enemy Act in March, 1919.

*B. Under Treaty:*

1. Under the treaty plaintiffs are entitled to recover the kronen deposit owed calculated in dollars at a pre-war rate of exchange, together with interest thereon, because it was a debt, credit or account, and regardless of whether it was a debt actually demanded and immediately due.

In addition, plaintiffs claim that should this debt not be held to be payable at a pre-war rate of exchange it

should be payable at a rate of exchange as of August 6, 1919, because plaintiffs then actually demanded the sum owed of the defendant bank.

Also, plaintiffs contend that interest should be allowed on the principal amount from the due date.

In view of the defendant bank's reliance upon its deposit of depreciated kronen with an Austrian Court, plaintiffs contend that such deposit did not discharge the defendant bank from its obligation to the plaintiffs.

Finally, plaintiffs have set forth an analysis of the equities in the case.

### POINT I.

**Plaintiffs are entitled to sue under Section 9 of the Trading with the Enemy Act whether or not the debt sued on was actually due and payable prior to October 6, 1917.**

This section of the act requires that for the maintenance of an action it is necessary only that there be a debt owned by and owing to the claimants prior to October 6, 1917. If these provisions are met the cause of action exists.

Section 9 of the Act has received interpretation by this Court in *Miller v. Robertson*, 266 U. S. 243. There Mr. Justice Butler, speaking for the Court, said in regard to the general interpretation which the Act is to receive, and particularly Section 9:

“At the time of the passage of the Act, a large amount of property was owned and much business was carried on by alien enemies and their allies in this country. Congress determined that their



property should be taken over and that trade with them should cease. The purpose was to weaken enemy countries by depriving their supporters of power to give aid. But the seizure of the money and property of the enemies and their allies would tend to hinder and might embarrass or ruin those having business transactions with them. *By the taking, the property seized would be put out of the reach of persons claiming it and beyond the power of creditors to attach it for debt.*" (Italics ours.)

It is apparent, therefore, that the Court recognized that one of the necessary effects of the Trading With the Enemy Act was to prevent American nationals, such as the plaintiffs here, from enforcing by attachment suit their right to collect a deposit, owing from an "enemy" bank. But for the provisions of the Trading With the Enemy Act, plaintiffs could unquestionably have brought a suit for the amount of the deposit indebtedness and could have attached the property of the defendant bank situated in this country. The Court, in effect, says that the Trading With the Enemy Act was not intended to penalize the American creditor by taking from him the right of attachment suit and other remedies without giving to him in lieu thereof some other means for the collection of his claim. The Court then goes on to say:

"The purpose of Section 9 was to prevent or lessen losses and inconvenience liable to result to non-enemy persons. This provision is highly remedial and should be liberally construed to effect the purposes of Congress and to give remedy in all cases intended to be covered (cites cases). The just purpose of the section is not to be defeated

by a narrow interpretation or by unnecessarily restricting the meaning of the word within technical limitations (cites cases).

Appellants contend that 'debt' as used in Section 9, is limited to its common law meaning. Undoubtedly, Congress intended to include causes of action which at common law were enforceable in an action of debt, such as those arising on bonds, notes, and other express promises to pay (citing cases) *quantum meruit*, and *quantum valebat* (citing cases).

The meaning of the word 'debt' as used in many statutes, is not restricted to demands enforceable in actions of debt."

The learned Justice then cites many examples of statutory construction in which the word "debt" is given a broad meaning, and continues:

"There is nothing in the language of the Act or the reasons for its enactment to indicate a purpose to restrict the right to institute suits in equity as authorized in Section 9 to causes of action cognizable in debt under technical procedural rules. The words of a statute are to be read in their natural and ordinary sense, giving them a meaning to their full extent and capacity, unless some strong reason to the contrary appears (cites cases).

We think it is immaterial whether plaintiff's cause of action is one for which an action of debt might be maintained. It would be unreasonable and contrary to the intention of Congress to exclude claims like that here in question, and we hold them to be included."

In *White v. Mechanics Securities Corporation*, 269 U. S. 283, decided by this Court on December 14, 1925,

the suits were brought under the Trading With the Enemy Act upon notes issued by the Imperial German Government and alleged to have been recognized by the present German Government. They sought to collect the amounts of the notes from funds alleged to have belonged to the Imperial German Government and taken over by the Alien Property Custodian. Mr. Justice Holmes delivered the opinion of the Court and said:

"The elaborate argument that was made against the jurisdiction of courts over actions against foreign governments or to examine the conduct of such governments is beside the mark. In these cases no judgment is asked against Germany or against property that it is entitled to defend. The funds were seized adversely by the United States in time of war. They are in its hands; it has declared by an Act of Congress what shall be done with them, and that is the end of the matter. There is no question that such a seizure and disposition are within its powers. *Brown v. United States*, 8 Cranch, 110, 129, 3 L. Ed. 504, 510; *Miller v. United States* (*Page v. United States*), 11 Wall. 268, 20 L. Ed. 135. The treaty with Germany has recognized their effect. Article 1 according the rights asserted by the joint resolution of July 2, 1921, Sec. 5, recited in the treaty, 42 Stat. at L. 1939."

The exact nature of the notes sued on is not revealed by the opinion of this Court, but in the opinion of the Court of Appeals of the District of Columbia, the Court below, reported in 4 Fed. (2nd) 619, the Court said at page 620:

"The notes were payable in American currency on April 1, 1917, five days prior to the declaration

of war between the United States and Germany. Upon payment of interest in advance the maturity of the notes was extended to April 1, 1918."

And again, at page 621:

"Section 9 of the Trading With the Enemy Act is a remedial measure, affording the method by which property wrongfully seized may be restored to its proper owner, or by which debts 'owing from an enemy or ally of enemy' may be recovered out of the property seized."

Concerning the instruments upon which these suits were brought, for eleven suits in all were heard in this appeal, the bill of complaint filed April 4, 1923 in the Supreme Court of the District of Columbia alleges as follows in paragraph 6:

"That prior to October 6, 1917, the Imperial German Government owed to complainant the sum of Two Hundred and Fifty Thousand Dollars (\$250,000) evidenced by 6% Treasury Notes of the par value of Forty Thousand Dollars (\$40,000) dated May 6, 1916, and of the par value of Two Hundred and Ten Thousand Dollars (\$210,000) dated May 24, 1916, all of said notes payable on April 1, 1917, known as Series 26; that Complainant purchased said notes for value long prior to the declaration of war between the United States and Germany and prior to October 6, 1917; and that said notes aggregating Two Hundred and Fifty Thousand Dollars (\$250,000) constitute a debt within the meaning of the provisions of Section 9 of the Trading With the Enemy Act, as amended; that on or about March 14, 1917, the payment and maturity of these notes was extended

to April 1, 1918 and interest thereon paid in advance to September 1, 1918; that thereafter, and on the 1st day of April, 1920, the amount of Eight Thousand Eighty-three dollars and Thirty-three cents (\$8,083.33) was paid to Complainant out of funds which had been paid to the Alien Property Custodian as the property of the Imperial German Government, which said payment, being applied by Complainant on account of past due interest, paid said interest up to and including the 14th day of March, 1919."

It will thus be noted that the bill of complaint did not allege this debt was *due* prior to October 6, 1917, but merely that prior to that date the German Government *owed* to complainant the sum of Two Hundred and Fifty Thousand Dollars (\$250,000), evidenced by 6% Treasury Notes due April 1, 1918.

The decrees affirmed by this Court in its above mentioned decision of December 14, 1925 were apparently not satisfied in full, for on April 12, 1926 the plaintiffs filed in the Supreme Court of the District of Columbia, a supplemental bill of complaint, the purpose of which, as set forth in paragraph 3 thereof, was

"to obtain from this Honorable Court orders and/or decrees directing and requiring the defendants to fully satisfy the final decree heretofore entered in this cause, out of property and/or money seized by the Alien Property Custodian and owing or belonging to, or held by, for, on account of or on behalf of, or for the benefit of the Imperial German Government or its successor government, the Republic of Germany, and now held by the defendants."

It appears from paragraph 7th of this supplemental bill that there remained unpaid on account of interest Sixty-nine Thousand, Forty-five Dollars and Fourteen Cents (\$69,045.14) as provided in the final decree (Transcript of Record, Court of Appeals of the District of Columbia, April Term, 1926, No. 4495, filed July 15, 1926, printed September 16, 1926, page 2, folio 2, and page 3, folios 2 and 3).

It is clear, therefore, that the instruments sued on in this case were dollar notes and bonds which did not become due until after October 6, 1917. It also is clear that the defendants raised no objection in that suit on the ground that while the debt was owned by and owing to the claimants prior to October 6, 1917 it was not then due. It also is clear that none of the courts hearing this case considered that the fact that the debt was not actually due prior to October 6, 1917, was sufficient ground for dismissing the bill.

Giving the statute the interpretation indicated by this Court in the *Robertson* and the *Mechanics* cases above quoted, it would appear that the claim here is for a debt cognizable under Section 9 of the Trading With the Enemy Act. The ordinary meaning of the word "debt" is an obligation due or about to become due. In common parlance a sum due upon demand is a debt regardless of whether or not a demand has actually been made. There can be no dispute that according to the ordinary meaning of the words of the statute as this Court has directed them to be interpreted, the state of facts here shown gives a cause of action to the plaintiffs.

It is to be observed that the only limitation upon the language of the applicable subdivision of the section is:

"Nor in any event shall a debt be allowed

under this section unless it was *owing to and owned* by the claimant prior to October 6, 1917" (Section 9 (e); italics ours.)

There is no provision that the debt must be actually due at that time. As a general rule of statutory construction it is held that the word "owing" in a statute means that a debt exists but not necessarily that it has become presently due and payable. We submit that the expressions of this Court in the *Robertson* case and in the *Mechanics* case indicate that this is the correct meaning to be given here.

It seems to us that the real question in this connection is whether the indebtedness is owing to and owned by the plaintiffs prior to October 6, 1917. If it was so owing to and owned by them, it is immaterial whether or not it was due.

## POINT II.

**The plaintiffs are entitled to recover of the defendants the value in dollars of the kronen deposit calculated at a pre-war rate of exchange.**

### A. ASIDE FROM TREATY PROVISIONS.

A court sitting in the United States can only give a money judgment in dollars. If the obligation whose breach is the basis of the action is to pay in currency of a foreign country the value of that currency must be computed in dollars. The general sharp decline in value of many foreign currencies has made important the question of the date at which this rate of exchange is to be computed. This question has received careful

examination from the courts and while the cases are not agreed the rule that the rate of exchange prevailing at the time of breach is to be applied is supported by the great weight of authority. This is the law of England. *The Celia v. The Volturmo* (1921), 2 A. C. 544, 20 A. L. R. 884—H. L. See also *Page v. Lercenson*, 281 Fed. 555, 558; *Dante v. Miniggio*, 298 Fed. 845; *Wichita Mill & E. Co. v. Naamlouze, etc., Industrie*, 3 F. (2nd) 931; *Hoppe v. Russo-Asiatic Bank*, 235 N. Y. 37, 39, affirming 200 App. Div. 460, 465; *Simonoff v. Granite City Nat. Bank*, 279 Ill. 248, 254; *Grunwald v. Freese* (Cal.), 34 Pac. 73, 76; *Manners v. Pearson & Son* (1898) 1 Ch. 581, 587-588, 592-593; *Societe des Hotels v. Cummings* (1921), 3 K. B. 459, 461 (reversed on another point (1922) 1 K. B. 451, 455, 463, 465); *Uliendahl v. Pankhurst Wright & Co.*, 39 Times L. R. 628; *Peyrac v. Wilkinson* (1924), 2 K. B. 166; *Barry v. van den Hurk* (1920), 2 K. B. 709, 712; *In re British American Continental Bank* (1922), 2 Ch. 589, 594-598.

This Court has applied the breach day-rule in *Birge-Forbes Co. v. Heye*, 251 U. S. 317; *Guinness v. Hicks*, 269 U. S. 71, and in *Sutherland v. Mayer*, 271 U. S. 272. It declined to follow this rule in *Deutsche Bank v. Humphrey*, decided November 23rd, 1926.

In both the *Guinness* case and the *Humphrey* case, *supra*, plaintiffs sued under Section 9 of the Trading With the Enemy Act to recover at a pre-war rate of exchange from property taken over by the Alien Property Custodian as belonging to the respective German defendants marks on deposit with German banks. In the *Guinness* case the debt matured by an account stated December 31, 1916. In the *Humphrey* case the debt



matured June 12, 1915 by reason of an oral demand upon the defendant bank. In both cases, therefore, the debt was due not only prior to the passage of the Trading With the Enemy Act but also prior to the inception of a state of war between the United States and Germany and prior to the severance of diplomatic relations between those countries.

The opinion of this Court in the *Humphrey* case reversed the decree below, which allowed a recovery at a pre-war rate of exchange, and held that there should be enforceable "no greater obligation than exists by that law (Law of Germany) at the moment when the suit is brought". The dissenting opinion in the *Humphrey* case is written squarely against the judgment day rule. It consequently is difficult to know whether in the *Humphrey* case the rate of exchange decreed to be applied is that of the date of the institution of suit or the date of the entry of one of the judgments.

In the dissenting opinion in the *Humphrey* case it is stated that the majority in that case rest upon the distinction that the debt upon which recovery there was sought was payable in Germany. In the majority opinion in that case it is stated:

"In this case, unlike *Hicks v. Guinness*, 269 U. S. 71, at the date of the demand the German Bank owed no duty to the plaintiff under our law. It was not subject to our jurisdiction and the only liability that it incurred by its failure to pay was that which the German law might impose."

It consequently appears that the *Guinness* case was distinguished by this Court from the *Humphrey* case on the ground that in the *Guinness* case the debt was payable

in the United States, whereas, in the *Humphrey* case the debt was payable in Germany, and that this conclusion was based upon the fact that in the *Guinness* case at the date the cause of action arose the plaintiffs resided in the United States, whereas, in the *Humphrey* case at the date of demand the plaintiff was in Germany. The brief of the defendant bank in the *Humphrey* case stresses the fact that the plaintiff was not in the United States at the time the cause of action arose and also that the record failed to show that, at that time, there was any property of the defendant bank in this country.

A search of the record in the *Guinness* case reveals no ground for the conclusion that the debt was payable in the United States other than that since the plaintiffs, at the time the debt became due, were resident in the United States, the situs of the debt, being that of the creditors, was the United States. In the *Humphrey* case the demand was made orally upon the defendant bank by the plaintiff in Germany and consequently at the time the debt became due the situs of the debt, being that of the creditor, was Germany.

*It therefore appears that the only ground of distinction between these cases is that in the Guinness case the situs of the plaintiffs, at the time the debt became due, was the United States, whereas, in the Humphrey case the situs of the plaintiff, at the time the debt became due, was Germany. In the instant case the plaintiffs were citizens and residents of the United States at the time the cause of action arose as well as for a long time theretofore and continually thereafter. Also, the record reveals that when the cause of action arose there was in the possession of the Alien Property Custodian property formerly belonging to the defendant bank. Both of these*

*statements are true whether it is considered that the cause of action arose because of an account stated, because of the inception of a state of war, because of the rule of non-intercourse between alien enemies, because of a demand upon the Alien Property Custodian or because of a demand upon the defendant bank. At all these times plaintiffs were resident and doing business within the United States, and there was within the United States property seized by the Custodian as belonging to the defendant bank. We submit that the instant case, therefore, falls squarely within the Guinness case on the question of applicability of the breach day rule.*

Assuming, then, that the rate of exchange to be applied is that of the time of breach or time the cause of action arose, it only remains to find the date of the breach in the instant case. The sum sued for is a general bank deposit, as is admitted by the bank (R., 36). The relation was banker and depositor, including the relationship of debtor and creditor. The defendant bank at all times owed the amount on deposit.

#### I. AN ACCOUNT WAS STATED AS OF APRIL 6, 1917.

When the *Guinness* case came before this Court it was held that the indebtedness owing from the "enemy" to citizens of the United States should be computed at the rate of exchange prevailing at the time of the breach, or at the time the cause of action arose. In that case there was an account stated as of January 1, 1916, this being done by letter dated January 6, 1920. In the case at bar there was an account stated as of April 6, 1917, this being done by letter dated April 1, 1920 (Plaintiffs' Exhibit 1, R., 111). That the amount of kronen sued for in the

amended complaint at the pre war rate is less by 1,250,000 kronen than the amount stated to be due and owing as of April 6, 1917, is immaterial. It is due to the allowance of a credit by the plaintiffs in the amount of 1,250,000 kronen against the amount so stated to be due by the Wiener Bank-Verein. To hold the contrary would mean that the defendant bank can escape the legal consequences of its account stated by impeaching its own statement, to show the amount owed was less than it stated.

The language of the letter from defendant bank to plaintiffs, dated April 1, 1920, is as follows:

" \* \* \* we have made up our mind to comply with your wishes in such a way as to take the amount of your pre-war balance held with us as per April 6th, 1917, viz., K.3,313,799.03 \* \* \* " (R., 111).

The answer of the defendant bank also admits this obligation at paragraph III. It reads in part:

"III. This defendant admits that on or about April 6th, 1917, the plaintiffs had on deposit with this defendant, a kronen balance amounting to 3,313,799.03 kronen \* \* \* " (R., 29).

In the stipulation dated December 5, 1923, the defendant bank also admits the account stated in these words:

"6. On or about the 1st day of April, 1920, the defendant, the Wiener Bank-Verein, deposited in the Circuit Court for the Interior at Vienna, in Part 6 thereof, the number of kronen in its bank stated to be due and owing to the plaintiffs as of April 6, 1917" (R., 37-38).

Further, in the stipulation dated December 18, 1923, the defendant bank again admits the account stated, in these words:

"The deposit made in the Circuit Court of Vienna, Part VI, on April 1, 1920, of the number of kronen in defendant bank stated to be due and owing to the plaintiffs as of April 6, 1917, included a further sum of kronen sufficient to equal two and one-half per cent. per annum interest down to April 1, 1920, the date of such deposit, on the amount stated to be due and owing to plaintiffs as of April 6, 1917" (R., 47).

Thus it specifically appears that the Wiener Bank-Verein allowed interest on the amounts of these accounts stated at two and one-half per cent. up to the time of its depositing the kronen with the Circuit Court at Vienna. We submit that nothing could more clearly demonstrate their understanding that the effect of the statement of the account was to create a new obligation, immediately due, upon which interest would accrue. Whether or not they allowed the rate of interest to which the plaintiffs are entitled as a matter of law is immaterial. They did concede that the debt was due as of April 6, 1917, and that interest should be paid by them for the use of the money up to the time that they paid it over into the hands of the Austrian court. It would be difficult to imagine a clearer case of an account stated, with all the rights and privileges flowing out of it.

The defendants have heretofore claimed that in the case of bank deposits a demand is necessary to make the deposit due even after an account has been stated between the parties. The decision of this Court in the

case of *Guinness v. Hicks*, *supra*, is, we submit, final on that point.

II. THE CONTRACT BETWEEN THE PLAINTIFFS AND THE DEFENDANT BANK WAS TERMINATED AND DISSOLVED BY THE INCEPTION OF A STATE OF WAR BETWEEN THE UNITED STATES AND AUSTRIA, AT WHICH TIME THE RIGHT ACCRUED TO THE PLAINTIFFS TO RECOVER THE DEPOSIT IN AN ACTION FOR MONEY HAD AND RECEIVED.

*a. Prior to the outbreak of war the contract in suit was executory; the doctrine of Hanger v. Abbott does not apply.*

The Circuit Court of Appeals, in its opinion below, summarily dismissed this point in the following language (R. 130) :

“ \* \* \* that war does not affect the relations of parties to an *executed* contract, but merely suspends the remedies available thereunder, was fully held in *Hanger v. Abbott*, 6 Wall. 532.” (Italics ours.)

The learned Circuit Court of Appeals is, as a general proposition, correct in its statement of the law formulated by *Hanger v. Abbott*, but, it is submitted, that case has no application to a contract such as is here under consideration. In the *Hanger* case a debt had become due and owing from a resident of the Confederacy (Arkansas) to residents of the United States (New Hampshire) prior to the outbreak of the Civil War. The creditor had fully performed; nothing remained to be done on the part of the debtor except to pay a liquidated sum of money. His obligation has been aptly termed a “unilateral debt”.

The Court held specifically that the operation of the Statute of Limitations was suspended during the continuance of the war, and, more generally, that the remedy of such an obligation had been *suspended* by the outbreak of war and revived at its termination.

The inapplication of the *Hanger* case to the contract now before the Court becomes apparent when the nature of this contract is fully considered. The contract between the plaintiffs and the defendant bank was not at the time of the declaration of war an executed contract in any proper use of the term. Not only is the agreement *executory* as opposed to any accepted use of the word *executed*, but it is wholly different in kind and in effect from those obligations wherein the courts have held that the remedy only is affected by the existence of a state of war between the countries of residence of the respective parties. But for the statement of the Circuit Court of Appeals quoted above, it would seem axiomatic that if the parties to a contract have bound themselves to do, or to refrain from doing, certain things in the future, the contract remains *executory* until the obligations are fully performed.

See :

*Farrington v. Tennessee*, 95 U. S. 679, at 683;  
*Fletcher v. Peck*, 6 Cranch. 87, at 136.

It is submitted that the contract before the Court must fall within the category of executory obligations. The contract is one of deposit in a bank. The relation created between the parties was that of banker and depositor with all of the mutual undertakings and obligations therein involved. To call the relation merely that of debtor and creditor and then, seeing merely the debt,

to apply the doctrine of *Hanger v. Abbott*, is to regard only one element of the contract and to disregard the balance of the essential characteristics of the relationship by which continued mutual duties were created.

The nature of the account between the parties is admittedly accurately described as follows (R. 36) :

“For a number of years preceding the outbreak of the war between the United States and Austria, plaintiffs maintained a bank account in kronen with the defendant, the Wiener Bank-Verein, in which the plaintiffs from time to time made deposits in kronen for the purpose of providing payment of drafts and orders issued and transmitted by the plaintiffs by letter, cable, wireless or otherwise, and drawn on and payable at the defendant, Wiener Bank-Verein, at Vienna.”

It was essential for the proper conduct of the plaintiffs' business that they use the services offered by a foreign banking house. The purpose of the account was to have funds readily available against which payees of the plaintiffs might cash their written orders, and from which cable and wireless transfer orders of the plaintiffs would be honored. The account, in order to effectuate this purpose, must have been available and subject to the plaintiffs' orders and instructions at all times. The money deposited was not a bailment; not a deposit for safe-keeping; not a deposit for a separate purpose. It was to be used for current business and was so used practically up to the declaration of war between Germany and the United States, making Austria-Hungary an ally of enemy, at which time there still remained to be performed all the mutual undertakings by each party



necessary to the continuation of the relationship. These mutual undertakings were, in the contemplation of the parties, to be carried on in the future as in the past. Certainly, the agreement, at the instant before the declaration of war, was not fully performed on either side; certainly not executed; certainly more remained to be done on the part of the bank than to pay to the plaintiffs a sum of money then due and owing; certainly more existed than a unilateral debt. It is submitted that the doctrine of *Hanger v. Abbott* has no application. Indeed, far from being an authority that the contract now before the Court was merely suspended by reason of the war, that case contains strong *dictum* supporting the proposition that the contract was totally abrogated. It is said at page 536:

“Executory contracts also with an alien enemy, or even with a neutral, if they cannot be performed except in the way of commercial intercourse with the enemy, are dissolved by the declaration of war, which operates for that purpose with a force equivalent to an Act of Congress.”

*b. An executory contract such as that before the Court, between nationals of enemy countries, resident within their respective countries, is terminated by the outbreak of war.*

By virtue of principles of International Law, by statute, and by accepted rules of common law, this contract is terminated. The doctrine in the United States may be stated as follows: An executory contract concluded before the outbreak of war between enemies “divided by the line of war” is terminated and dissolved by the outbreak of war (1) if it inures to the aid of the

enemy, or, (2) if it is in its nature incapable of suspension. A contract will in its nature be incapable of suspension (a) if its proper performance necessitates intercourse with the enemy during the war, or, (b) where the parties cannot on conclusion of peace be made equal, since the doctrine of revival of contracts suspended by war is based on considerations of equity and justice.

As to the termination of contracts inuring to the aid of the enemy nothing need be said; the soundness of the doctrine is self-evident.

*Contracts, the performance of which requires intercourse with the enemy, are terminated by the outbreak of war.*

There is no rule of International Law more universally acknowledged and adopted than the rule of non-intercourse between alien enemies, the test of enemy character being commercial domicile. This doctrine has been law in the United States since the cases of *The Venus* (1814), 8 Cranch. 253, and *The Harmony* (1800), 2 C. Rob. 322. See also *Kershaw v. Kelsey*, 100 Mass. 561, at 568-574, where the question is discussed by Mr. Justice Gray whose opinion has received the approval of this Court in *Briggs v. United States*, 143 U. S. 346, at 353.

See further:

*Williams v. Paine*, 169 U. S. 55, at 72;

*Birge-Forbes Co. v. Heye*, 251 U. S. 317, at 323.

In an article entitled "Force Majeure" by Hon. John Bassett Moore, a member of the Permanent Court of In-

ternational Justice, found re-printed in Meares "Trading With the Enemy Act", it is said, pages 461-463:

"IV. AMERICAN AND ENGLISH JURISPRUDENCE.

American and English law have admitted, only to a certain extent, the principle of the dissolution of contracts by *force majeure*, although the courts of England have in recent years, and especially during the present war, with the extraordinary changes which it has wrought in commercial conditions, shown a tendency to give to the principle a more extended application.

But, however, this may be, it is not open to doubt that, *by the law of England and of the United States, pre-war executory contracts between enemies, the performance of which requires continued and continuous acts of commercial intercourse between them, are dissolved by reason of the existence of the war.*" (Italics ours.)

"Oppenheim is therefore well justified when he states that, from the general principle asserted in the leading cases (citing *The Hoop*, 1 C. Rob. 196; *Potts v. Bell* (1800), 8 D. & E. 548; *Furtado v. Rogers* (1802), 3 P. & B. 191; *Esposito v. Bowden* (1857), 7 E. & B. 763; *The Mashona* (1900), 10 *Cape Times Law Reports*, 170), the courts have drawn the following important consequences:

'(3) As regards contracts entered into *before* the outbreak of war (*Melville v. DeWold* (1855), 4 E. & B. 844; *Esposito v. Bowden* (1857), 7 E. & B. 763; *Ex Parte Boussmaker* (1806), 13 Ves. Jun. 71; *Alcinous v. Nygren* (1854), 4 E. & B. 217; *The Carlotta* (1814), 1 Dodson 390), a distinction must be drawn; (a) Executory contracts are avoided, both parties being released from performance, (b) Contracts executed before the

outbreak of war and not requiring to be acted upon during the war are suspended until after the conclusion of peace, (c) Executed contracts which require acting upon during the war are dissolved.

(4) Partnerships with alien enemies are dissolved.' International Law, 2d Ed. 1912, 136-137.

(a) AMERICAN DECISIONS.

In the United States, what may be called the leading judicial case on the subject is that of *Griswold v. Waddington*, decided by the court of errors of New York in 1819. The particular question was that of a partnership, and the principal opinion was delivered by that great authority on the law of nations, Chancellor Kent. The case came up from the Supreme Court of the State, which had decided that the partnership, composed of a British subject living in London, and three citizens of the United States, was dissolved by the outbreak of war between the two countries in 1812. Addressing himself to this point, Chancellor Kent held 'that the declaration of war did, of itself, work a dissolution of all commercial partnerships, existing at the time, between British subjects and American citizens'.

There were, said Kent, no cases in the English books, exactly in point. The question apparently had not been raised, presumably because it had 'been deemed too difficult a proposition to be even hazarded'.

He maintained that 'the partnership existing before the war, was from reason and necessity, dissolved by the act of war'.

*Griswold v. Waddington* (1819), 16 Johns. 438.

The authority of the foregoing decision has never been questioned. The same principle was enunciated in the case of *The William Bagley*, in which Mr. Justice Clifford, speaking for the Supreme Court of the United States, said:

‘Executory contracts with an alien enemy, or even with a neutral, if they cannot be performed except in the way of commercial intercourse with the enemy, are *ipso facto* dissolved by the declaration of war, which operates to that end and for that purpose with a force equivalent to that of an act of Congress.’ *The William Bagley* (1866), 5 Wall. 377.”

This principle of International Law, resting upon sound principles of public policy, has been recognized as settled common law by the courts since *Griswold v. Waddington*, 16 Johns. 438, and was reaffirmed by the legislative prerogative of Congress in the enactment of the Trading With the Enemy Act, by which such intercourse was made not only illegal (Sec. 3) but criminal (Sec. 16).

For recent cases holding that executory contracts, the performance of which necessitates commercial intercourse or trading of whatever kind with an alien enemy, are entirely terminated by the existence of a state of war, we refer to:

*Second Russian Insurance Co. v. Miller*, 297 Fed. 404, at 410 (C. C. A. 2nd, aff’d 268 U. S. 552);

*Joring v. Harriess*, 292 Fed. 974 (C. C. A. 2nd, certiorari denied, 263 U. S. 710).

In *Joring v. Harriss*, *supra*, the plaintiffs, who in early 1917 resided in the United States, with orders from Austria for cotton, made a contract in February, 1917, with the defendants by the terms of which defendants agreed to ship the cotton to Spain and store it for certain Austrians for delivery and payment at close of the war. The profits in the transaction were to be shared between the parties. The defendants shipped and stored the cotton, but after the outbreak of war between Germany and the United States, April 6, 1917, making Austria-Hungary an ally of enemy, and after the passage of the Trading With the Enemy Act, October 6, 1917, the defendants sold the cotton to Spaniards. The plaintiffs sued under the above mentioned contract to obtain a share in the profits from this disposal of the cotton. The Court, per Hough, Circuit Judge, denied recovery on the basis that the "*declaration of war and/or the Trading With the Enemy Act*" (p. 979) forbade trading with the buyers after the outbreak of hostilities; that "trading" included "carrying on" any contract, agreement or obligation; that in storing the cotton in Spain during the war the contract would be "carried on"; and therefore, by statute, this contract came to an end. On page 979 the Court added:

"We might go farther as we are of the opinion that this agreement became against public policy on April 6, 1917. The effect of the contracts made was that the money, property and credits of certain citizens of the United States were tied up in the carrying or keeping of 10,000 bales of cotton for the ultimate benefit of an ally of the enemy."

In the case at bar the record bristles with evidence that the contract of deposit in order effectually and

efficiently to be carried out by the parties depends *in its essence* upon free and untrammelled communication between them. The existence of such communication was a material part of the agreement—so material that unless it was available the contract must be held to have become impossible of performance through no fault of either party, and their respective rights accordingly adjusted.

These plaintiffs, upon the inception and during the existence of the war, were faced by a dilemma. The account was useless to them unless they could communicate with the defendant bank, whereas by attempting to so communicate they must have taken steps violating the rules of international law, of common law and of statute. The situation is indeed anomalous if a contract is preserved in spite of the fact that performance of one of its essential terms has been made illegal by every conceivable rule of law.

*Contracts between nationals of enemy countries, resident within their respective countries, are terminated when the circumstances are such that it would be inequitable to revive them.*

In *New York Life Insurance Co. v. Statham*, 93 U. S. 24, the Court, discussing the effect of war on contracts, said, pages 31-32:

“It (the court below) supposes the contract, to have been suspended during the war, and to have revived with all its force when the war ended. Such a suspension and revival do take place in the case of ordinary debts. But have they ever been known to take place in the case of executory contracts in which time is material?”

And further:

"The truth is, that the doctrine of the revival of contracts suspended during the war is one based on considerations of equity and justice and cannot be invoked to revive a contract which it would be unjust or inequitable to revive."

In this case the Court held that a life insurance contract with a provision for forfeiture on non-payment of premium was extinguished by such non-payment even though it was caused by the intervention of the Civil War. It is not clear that the Court expressly declared the contract terminated by virtue of the mere existence of the state of war, the assured being residents of Mississippi and the defendant a New York corporation, although the language just quoted indicates that this is so. It may perhaps be argued that the contract was declared by the Court to be terminated by virtue of the operation of the forfeiture clause. If the latter view is correct, it is submitted that the Court has seized upon the forfeiture clause as the most convenient way of declaring the contract at an end. The Court undoubtedly based its result on the ground that the time of payment of premium was of the essence in insurance contracts, by reason of the company's reliance upon prompt payments in figuring rates, and, therefore, in the circumstances, if the contract survived as against the insurance company, an inequitable situation would have resulted when payment of premiums was belatedly made after the war. In holding time of the essence of this agreement, it is submitted that the Court determined the promise to pay premiums an absolute one, the failure of performance of which is inexcusable on any ground. But the practical result and *effect* of the decision is certainly that *war*



*terminated the contract*, even though the exact *holding* may be considered to have been that the contract was terminated by "non-payment of the premium, even though the payment was prevented by the existence of the war" (p. 33). The policy was terminated because of non-payment of premium, but such payment was defaulted because it was impossible and illegal under the rule of non-intercourse between persons divided by the line of war, and this rule arose because of the inception and existence of a state of war. Suppose the parties to a contract stipulate that it shall terminate in the event of war between their respective nations. If war breaks out the contract admittedly will terminate, and it becomes unnecessary to decide whether the result is reached by enforcement of this clause in the contract, or as a matter of law, by the existence of a state of war. So in the *Statham* case. The parties contemplated forfeiture in the event of non-payment whatever the cause of non-payment: in effect, an implied covenant that in case of war preventing payment the contract would end. Thus the contract is ended, be it by operation of law or by virtue of the agreement—a question not necessary for the Court flatly to decide.

In any event, the *test* formulated in the *Statham* case as to the revival of a contract only when revival is equitable, has not been challenged in subsequent decisions. Of course, the doctrine that where time of payment is of the essence, and the payment is not made on time, the contract will not be suspended because, upon revival, the parties will not find themselves in *status quo ante*, is only a part of or more specific application of the broader general rule stated in the *Statham* case. The only reason there that the premiums were not paid on time being the rule of non-intercourse due to war (p. 25),

the Court might have equally well specifically held, and, we submit, did in effect hold, that commercial intercourse was of the essence of the contract.

Applying this test to the contract at bar, it was in contemplation of the parties and the essence of the agreement, that the money deposited be available to and subject to the order of the depositor at all times. The usefulness and the very purpose of this deposit was nullified unless orders of withdrawal were easily and readily honored. If the account was not available for use in current business it was no longer fulfilling the purpose for which it was created. The inequity of merely suspending contracts of this nature is apparent. The fact that the plaintiffs in this case were compelled to open a new kronen account with the Wiener Bank-Verein at the end of the war because the kronen in their old account had ceased to be legal tender in March, 1919, is significant (R. 109).

It is submitted to be obvious that to do other than declare the contract, under which this deposit was made, totally abrogated by the declaration of war will violate the test established in the *Statham* case, by which "considerations of equity and justice" are invoked to determine whether the contract should be revived at the termination of hostilities.

No case has been found as to the effect of war upon contracts between a bank and its depositor but authority is available in other cases of executory contracts not unanalogous to the instant question.

*Joring v. Harriss, supra;*  
*Atlantic Communication Co. v. Zimmermann,*  
182 App. Div. 862;

*Zinc Corp., Ltd. v. Hirsch* (1916), 1 K. B. 541;

*Clapham S. S. Co., Ltd. v. Naamloose Vennootschap Handels-en Transport-Maatschappij Vulcaan* (1917), 2 K. B. 639;

*Ertel Bieber & Co. v. Rio Tinto Co.* (1918), A. C. 260.

In *Ertel Bieber & Co. v. Rio Tinto Co.*, *supra*, an English company, prior to the war, contracted to sell to three German companies quantities of ore to be delivered over a number of years. Each contract contained a clause that it be suspended merely on the outbreak of war. When war was declared some of the contracts were wholly and some partly executory. The plaintiffs asked for a declaration that all the contracts were dissolved. It was held by the House of Lords that the declarations be made, since the contracts involved trading with the enemy and as such were totally abrogated.

In view of the clause merely suspending the contract in case of war, the case is especially significant and clearly indicates the attitude of the House of Lords in matters of this kind. A contract requiring for its performance intercourse with the enemy is entirely and totally abrogated, irrespective of any agreement of the parties to the contrary.

To sum up: It is our position that on April 6, 1917, at the declaration of war between the United States and Germany, making Austria-Hungary an ally of enemy, or at the latest, on December 7, 1917, at the declaration of war between the United States and Austria-Hungary, the contract between the plaintiffs and defendant bank which created the relationship of bank and depositor and which pre-existed the war, *and all the incidents thereto*

*pertaining*, came to an end. This result is reached either because the contract was one requiring intercourse with the enemy, or, to put it differently, because the contract was one which, under all its terms and the surrounding circumstances, it is inequitable to revive, intercourse with the bank being of the essence.

It follows that *no term* of that contract can be insisted upon by the defendant bank and, consequently, as discussed elsewhere in this brief (Point V, *infra*), the contract cannot by its terms, if any such there were, be subjected to Austrian law. That term, if it ever existed, as well as every other, fell when the contract fell. Furthermore, no demand, as possibly provided for, was necessary in order that the amount of the deposit become due and payable to the plaintiffs as of the date war was declared. If a contract becomes impossible of performance, or is terminated without fault of either party, and if one party has paid money thereunder greater in amount than the value of the performance which has been made by the other party, the former may recover said money back in an action for money had and received—not under the contract, but on the basis of a *quantum valebat* or a *quantum meruit*.

*New York Life Insurance Co. v. Statham*,  
*supra*, at 33, *et seq.* (93 U. S. 24) ;

*Atlantic Communication Co. v. Zimmermann*,  
*supra* (182 App. Div. 862).

See also:

*III Williston, Contracts, Sec. 1974.*

The *Atlantic Communication* case is squarely in point. The plaintiff had paid dollars to defendants in

consideration of the defendant's promise to effect a mark payment in Germany. By virtue of the intervention of war performance by defendants became impossible, and plaintiff sued to recover the dollars paid in. It happens that the defendants in that case are the plaintiffs here, and that the *Atlantic Communication* case was one of the many of the same nature in which recoveries of dollars were made, and where, because of having "covered" the transaction and having changed their position, the defendants could not be put back in *statu quo* after a rescission of the contract, and a recovery by the plaintiff in money had and received. After judgment for defendants, plaintiff's motion for a new trial was denied, and plaintiff appealed. In reversing this judgment and order the Court said (p. 868):

"This was a purchase of a wireless transfer of credit for 250,000 marks, which credit was by wireless to be made available for plaintiff's immediate use in Berlin, and on defendants' failure to perform, owing to performance having been rendered impossible by reason of the war conditions, plaintiff would be entitled to the return of its money."

The case was retried, resulting in judgment for plaintiff. Defendants appealed to Appellate Division which affirmed without opinion, and defendants' motion for leave to appeal to the Court of Appeals was denied after the decision in *Gravenhorst v. Zimmermann*, 236 N. Y. 22, was handed down by the Court of Appeals a few days later.

For the reasons stated in the opinion above quoted it is submitted that plaintiffs' action for money had and received arose when war was declared.

*c. There is nothing in the treaty of Vienna, incorporating provisions of the Treaty of St. Germain, to prevent the recovery by plaintiffs of the kronen owed at a pre-war rate of exchange.*

It may be argued that the framers of the Treaty of Vienna considered the question of the effect of the war on contracts between enemies when in Section 1 of Article II of the treaty of August 24, 1921, with Austria, Part X of the Treaty of St. Germain was incorporated *inter alia* as defining the rights and advantages it was intended the United States should enjoy. Section V of Part X of the Treaty of St. Germain covers "Contracts, Prescriptions, Judgments". Subdivision (a) of Article 251 of that section provides:

"Any contract concluded between enemies shall be regarded as having been dissolved as from the time when any two of the parties became enemies \* \* \*."

But subdivision (c) of that Article declares:

"Having regard to the provisions of the Constitution and law of the United States of America, \* \* \* neither the present Article \* \* \* nor the annex hereto shall apply to contracts made between nationals of these States and nationals of the former Austrian Empire; \* \* \*."

The argument of the defendant bank may be, that since the question of abrogation of contracts was considered, and the United States specifically exempted from the operation of the treaty clause contracts between American and Austrian nationals, the intention of the parties was that such contracts should not be declared terminated by outbreak of war.

It is submitted that subdivision (c) of Article 251 has no effect other than its wording indicates; it does nothing more than exempt the United States from the stipulations of Articles 251, 252 and 257. If Article 251 changes the common law in respect to the effect of war on executory contracts, it has no bearing on the case before the Court because, by its terms, it excludes contracts between American and Austrian nationals. If on the other hand it is declaratory of the common law, its inapplicability to contracts between citizens of the United States and Austria is immaterial. It cannot reasonably be argued that the refusal of a legislative body to adopt a statute or approve a treaty declaratory of the common law evidences an intent on the part of that body to change the common law rule and has the effect of making the previous common law rule inapplicable to the subject matter theretofore controlled by it. Suppose an extreme case: Assume the treaty provided that agreements between citizens of enemy countries, unsupported by consideration, should not be classed as "contracts" under Article 251, and that this provision should not apply to contracts between citizens of the United States and Austria, it clearly could not seriously be argued that the clause thus exempting contracts between nationals of the United States and Austria evidenced an intent on the part of the United States that the rule of the common law as phrased in the treaty should no longer be applied to such contracts.

It seems equally obvious that the argument cannot be evoked to make inapplicable other provisions of the treaty under which the plaintiffs as nationals of the United States have rights and privileges. As indicated above, subdivision (c) of Article 251 exempts the United States

from the operation of Articles 251, 252 and 257 and that is all. The contention that the mere use of the word "contract" in an inapplicable Article will result in the inapplication of every Article under which a contract right could be asserted, needs only to be stated in order to be refuted. Furthermore, the full text of subdivision (a) of Article 251 indicates that not all obligations that might properly be included under the word "contracts" were considered:

"Any contract concluded between enemies shall be regarded as having been dissolved \* \* \*, except in respect of any debt or other pecuniary obligation arising out of any act done or money paid thereunder \* \* \*."

It is submitted that nothing in Article 251 of Part X of the Treaty of St. Germain prevents the application either of ordinary rules of common law or other Articles of that treaty to the contract with the Wiener Bank-Verein here under consideration.

III. THERE WAS A DEMAND ON OR ABOUT MARCH 25, 1919, BY THE FILING OF A CLAIM WITH THE ALIEN PROPERTY CUSTODIAN.

On or about March 25, 1919, the plaintiffs filed with the Alien Property Custodian a notice of claim against the Wiener Bank-Verein Trust (R., 48). A substantial copy of this document is Plaintiffs' Exhibit 4 and appears in the record at pages 49-56. The claim was for "monies and securities due to claimant" from the defendant bank, and specifically set forth as due a cash balance of 2,951,027.33 kronen. This suit is now brought for 2,063,799.03 kronen (R., 19). Accrued interest at four



per cent. was claimed on the above mentioned cash balance from January 1, 1916. It claims, therefore, a debt due and owing on January 1, 1916.

Subsection 8 (a) of the Trading With the Enemy Act reads in part as follows:

"Sec. 8 (a). That any person not an enemy or ally of enemy \* \* \* who is a party to any lawful contract with an enemy or ally of enemy, the terms of which provide for a termination thereof upon notice or for acceleration of maturity on presentation or demand, \* \* \* may terminate or mature such contract by *notice* or presentation or demand served or made on the Alien Property Custodian in accordance with the law and the terms of such instrument or contract and under such rules and regulations as the President shall prescribe; and such *notice* and such presentation and demand shall have, in all respects, the same force and effect as if duly served or made upon the enemy or ally of enemy personally. \* \* \*"

(Italics ours.)

We respectfully submit that this notice filed with the Alien Property Custodian on March 25, 1919, had the effect of maturing the debt of the defendant bank to plaintiffs *if it should be held that such obligation to pay did not exist theretofore*. The amount demanded in the notice is greater in total than the amount sued for here, and of course includes the latter.

It must be obvious that during the period of the war it was practically impossible for plaintiffs to know exactly what their balance was on the books of the defendant bank. Credits and debits frequently were made by both sides on their own books, the advices of which failed to

reach the other, or which were unexecuted for other reasons. In fact, the plaintiffs did not know until long after hostilities had ceased how many of hundreds of pre-war orders, which they had sent between October 6, 1916 and April 3, 1917 and debited on their own books, had been executed.

Furthermore, even the defendant bank had as late as April 1, 1920 no accurate knowledge of the exact state of the account. In its letter of that date to the plaintiffs it said:

"As the situation is at present, we are much to our regret not in a position to comply with your wishes and to reverse all our entries in order to re-establish the balance of April, 1917, *the whole account being in a great mix-up and all entangled, a great many of your pre-war orders having been executed against your German-Austrian Kronen account and a good many after-war orders having been effected against your old Kronen account, so that it is very hard to ascertain now which is which*" (R., 110-111). (Italics ours.)

Counsel for the defendant bank in their briefs below have conceded that it would have been possible and proper to mature the deposit by filing a demand therefor with the Alien Property Custodian, pursuant to Subsection 8 (a) of the Trading With the Enemy Act, but claims that this was not done. Counsel for both the defendant bank and the Alien Property Custodian seem to make some technical distinction between claims filed under Subsection 8 (a) of the Trading With the Enemy Act and claims filed under Section 9 of that Act. We will concede that it is possible that a claim filed under Subsection 8 (a) might not comply with the requirements of a claim

to be filed under Section 9 of the Trading With the Enemy Act. However, it seems clear to us that a claim filed under Section 9 of the Act fulfills all the requirements of a demand under Section 8 (a). The Act does not prescribe that the claims shall be filed in any specified form and where the plaintiffs filed a notice of claim under Section 9 of the Act, setting forth that a debt arising out of a deposit with a foreign bank was due and owing to them, it seems clear that such a proceeding complies with all the requirements of Section 8 (a). No useful purpose could be served by requiring the plaintiffs to serve on the Alien Property Custodian a demand, and subsequently to file a claim based on that demand. The defendants concede in the present case that the service of a bill of complaint in this suit was a sufficient demand to make the debt due. If the complaint in this action is such demand it is difficult to see how the defendants can consistently assert that the claim filed with the Alien Property Custodian in March, 1919 was not also such a demand. The distinction insisted on by counsel for the defendants would seem to be unjustified by the Act or by any reason of justice or expediency.

#### B. UNDER TREATY PROVISIONS.

*Under the Treaty of August 24, 1921, between the United States and Austria, the plaintiffs below are entitled to have this Court apply the pre-war rate of exchange for United States dollars and Austrian kronen with interest at the rate of five per cent. per annum in determining the amount of the debt owing to the plaintiffs by the Austrian defendant.*

Under the Constitution and repeated decisions of the United States Supreme Court, treaties made under the

authority of the United States are the supreme law of the land and are as much a part of the law of the United States as an act of Congress or the Constitution itself.

Constitution, Article VI;

*Ware v. Hylton*, 3 Dall. 199;

*Ogden v. Blackledge*, 2 Cranch 272;

*Hopkirk v. Bell*, 3 Cranch 454, 4 Cranch 164;

*Higginson v. Mein*, 4 Cranch 414;

*United States v. Schooner Peggy*, 1 Cranch 103, 109;

Head Money Cases, 112 U. S. 580;

*United States v. Percheman*, 7 Peters 51;

*Chae Chau Ping v. U. S.*, 130 U. S. 581;

*Whitney v. Robertson*, 124 U. S. 190;

*Blythe v. Hinckley*, 173 U. S. 501, 508;

*Hauenstein v. Lynham*, 100 U. S. 483;

*State of Georgia v. Brailsford*, 3 Dall. 1;

*Jones v. Walker* (Opinion by Jay, *C. J.*, not dated), 2 Paine 688;

*Foster v. Neilson*, 2 Peters 253;

*Lessee of Pollard's Heirs v. Kibbe*, 14 Peters 353.

In the Treaty of Peace between the United States and Austria, signed August 24, 1921 (42 Stat. L. 1946, United States Treaty Series No. 659), Austria grants and the United States reserves all the rights, privileges, indemnities, reparations or advantages specified in the joint resolution of Congress of July 2, 1921 (42 Stat. L. 105, Public Resolution No. 8, 67th Congress), including those stipulated for the benefit of the United States in the Treaty of St. Germain-en-Laye (United States Treaty Series No. 659).

The Joint Resolution of Congress of July 2, 1921, which is specifically set forth in the preamble and referred to in the body of said treaty, reserves to the United States of America and its nationals any and all rights, privileges, indemnities, reparations or advantages, together with the right to enforce the same, which under the Treaty of St. Germain have been stipulated for its or their benefit.

Therefore, it seems clear that although the Treaty of St. Germain was not ratified as such by the United States, the nationals of the United States are entitled by virtue of Act of Congress and the Treaty of Vienna to whatever rights, privileges and advantages were stipulated for the benefit of nationals of the Allied and Associated Powers in the Treaty of St. Germain. In this regard Article II of the Treaty of Vienna reads as follows:

“With a view to defining more particularly the obligations of Austria under the foregoing Article with respect to certain provisions in the Treaty of St. Germain-en-Laye, it is understood and agreed between the High Contracting Parties,

(1) That the rights and advantages stipulated in that Treaty for the benefit of the United States, which it is intended the United States shall have and enjoy, are those defined in Parts V, VI, VIII, IX, X, XI, XII and XIV.”

The only question, consequently, is whether the Treaty of St. Germain confers any rights, privileges or advantages upon an American national bringing an action under Section 9 of the Trading With the Enemy Act.

Among the provisions of the Treaty of St. Germain, to the benefit of which the United States and its nationals

are entitled, are the provisions of Part X, entitled "Economic Clauses". In Section IV of Part X is found Article 249 entitled "Property, Rights and Interests". Under this Article the United States was entitled to retain and liquidate all the property which had been taken under its control through the operation of the Trading With the Enemy Act and which is now found in the hands of the Alien Property Custodian. Subdivision (h) of Article 249 provides as follows:

"(h) Except in cases where, by application of paragraph (f), restitutions in specie have been made, the net proceeds of sales of enemy property, rights or interests wherever situated carried out either by virtue of war legislation, or by application of this Article, and in general all cash assets of enemies, other than proceeds of sales of property or cash assets in Allied or Associated countries belonging to persons covered by the last sentence of paragraph (b) above, shall be dealt with as follows:

(1) As regards Powers adopting Section III and the Annex thereto, the said proceeds and cash assets shall be credited to the Power of which the owner is a national, through the Clearing Office established thereunder; any credit balance in favour of Austria resulting therefrom shall be dealt with as provided in Article 189, Part VIII (Reparation), of the present Treaty.

(2) As regards Powers not adopting Section III and the Annex thereto, the proceeds of the property, rights and interests, and the cash assets, of the nationals of Allied or Associated Powers held by Austria shall be paid immediately to the person entitled thereto or to his Government; the

proceeds of the property, rights and interests, and the cash assets of nationals of the former Austrian Empire, or companies controlled by them, as defined in paragraph (b) received by an Allied or Associated Power shall be subject to disposal by such Power *in accordance with its laws and regulations and may be applied in payment of the claims and debts defined by this Article or paragraph 4 of the Annex hereto.* Any such property, rights and interests or proceeds thereof or cash assets not used as above provided may be retained by the said Allied or Associated Power and if retained the cash value thereof shall be dealt with as provided in Article 189, Part VIII (Reparation) of the present Treaty." (Italics ours.)

It will be observed that Sub-paragraph (1) of Subdivision (h) relates to Powers which adopt Section III of Part X of the Treaty of St. Germain. Sub-paragraph (2) of Subdivision (h) relates to Powers which do not adopt Section III.

Section III of Part X of the Treaty of St. Germain, being Article 248 and Annex, relates to a settlement through the intervention of Clearing Offices established by the respective parties, as stated in said Article. It was not contemplated at the time of the negotiation of the Treaty of St. Germain that the United States should adopt the plan set forth in Section III and establish the clearing offices mentioned therein. Accordingly, the treaty did not make the provisions of Section III obligatory upon the Allied and Associated Powers, but gave to each of them an option (Art. 248, Annex (1)). It may be said in passing that one of the reasons why it was not contemplated that the United States should adopt the clearing office plan was that under paragraph (b) of

Article 248 the Powers adopting that plan would make themselves responsible for the payment of debts, as stated, and it was not expected that legislation to this effect would be readily obtainable in the United States.

But, while the United States did not contemplate the adoption of the clearing office plan, a definite provision was made to meet its situation in Paragraph 4 of the Annex following Article 250. This paragraph is as follows:

"All property, rights and interests of nationals of the former Austrian Empire within the territory of any Allied or Associated Power and the net proceeds of their sale, liquidation or other dealing therewith may be charged by that Allied or Associated Power in the first place with payment of amounts due in respect of claims by the nationals of that Allied or Associated Power with regard to their property, rights and interests, including companies and associations in which they are interested, in territory of the former Austrian Empire or debts owing to them by Austrian nationals, and with payment of claims growing out of acts committed by the former Austro-Hungarian Government or by any Austrian authorities since July 28, 1914, and before that Allied or Associated Power entered into the war. The amount of such claims may be assessed by an arbitrator appointed by Mr. Gustave Ador if he is willing, or if no such appointment is made by him, by an arbitrator appointed by the Mixed Arbitral Tribunal provided for in Section VI. They may be charged in the second place with payment of the amounts due in respect of claims by the nationals of such Allied or Associated Power with regard to their property,



rights and interests in the territory of other enemy Powers, in so far as those claims are otherwise unsatisfied."

This paragraph relates to property, rights and interests of Austrian nationals within the territory of an Allied or Associated Power, and it thus embraces the property, rights and interests of Austrian nationals within the territory of the United States and which have been taken over under the Trading With the Enemy Act and are held in the possession of the Alien Property Custodian. Paragraph 4 relates to the net proceeds of the sale, liquidation or other dealing with this property, for Article 249 entitled the United States to sell, liquidate and deal with this property. Paragraph 4 expressly provided that the property rights and interests of Austrian nationals within the United States and the net proceeds of their sale, liquidation or other dealing therewith might be charged by the United States with certain claims and liabilities stated in that paragraph. Among such charges it is provided that such property and proceeds might be charged with "debts owing to them (that is, to United States nationals) by Austrian nationals"; that is to say, it was expressly agreed in the Treaty of St. Germain that the property in the hands of the Alien Property Custodian, taken under the Trading With the Enemy Act, could be charged with debts, owing to citizens of the United States by citizens of Austria. While the provision of Article 4 obviously was intended to apply to the United States, there is interesting internal evidence, aside from the use of the term "Associated Power", of this intent in the provision that the property in the hands of the Alien Property Custodian could be charged with the payment of claims growing out of acts committed by

the former Austro-Hungarian Government since July 28, 1914, and "before that Allied or Associated Power entered into the war". That was the American contribution to this portion of the Treaty of St. Germain.

Provision is made in paragraph 4 for an assessment of claims by an arbitrator appointed by Mr. Gustave Ador, or if he made no appointment by an arbitrator appointed by the Mixed Arbitral Tribunal, provided for in Section VI. In lieu of setting up the Mixed Arbitral Tribunal, the United States Government entered into a claims convention with Austria, for the presentation and consideration of claims. The assessment by such a Tribunal was not, however, an exclusive provision, for the United States under Article 249 was to have the right to retain and liquidate the property belonging to Austrian nationals within its territory and to carry out its liquidation in accordance with its laws.

Referring again to sub-paragraph (2) of sub-division (h), it will be seen that this relates to the United States as a Power not adopting Section III (for the United States, as was contemplated, has not adopted Section III, the clearing office plan), and this sub-paragraph provides that the proceeds of the property of Austrian nationals received by the United States shall be subject to disposal by the United States, *in accordance with its laws and regulations*, and may be applied in payment of the claims and debts defined by Article 249 and by paragraph 4 of the Annex, above quoted.

Thus there is the most explicit provision that the United States, under its treaty with Austria (the Treaty of Vienna), is entitled to the benefit of this provision in the Treaty of St. Germain, is entitled to charge against the property in the hands of the Alien Property Custodian the debts owing to its nationals, and having provided

remedies to its nationals by Section 9 of the Trading With the Enemy Act, there is direct treaty support of the right of these nationals to obtain that recovery for their debts from the property in the hands of the Alien Property Custodian, in accordance with the provisions of the Trading With the Enemy Act.

In paragraph 14 of the Annex which follows Article 250 and is the Annex referred to in Article 249, appears the following provision:

"The provisions of Article 249 and this Annex relating to property, rights, and interests in an enemy country, and the proceeds of the liquidation thereof, apply to debts, credits and accounts, Section III regulating only the method of payment.

In the settlement of matters provided for in Article 249 between Austria and the Allied or Associated Powers, their colonies or protectorates, or any one of the British Dominions or India, in respect of any of which a declaration shall not have been made that they adopt Section III, and between their respective nationals, the provisions of Section III respecting the currency in which payment is to be made and the rate of exchange and of interest shall apply unless the Government of the Allied or Associated Power concerned shall within six months of the coming into force of the present Treaty notify Austria that one or more of the said provisions are not to be applied."

This, again, is a provision to the benefit of which the United States and its nationals are entitled by the explicit provisions of the Treaty of Vienna. And while the United States did not adopt the clearing office plan

of Article 248 of the Treaty of St. Germain it became entitled by virtue of paragraph 14 of the Annex following Article 250, being the Annex referred to in Article 249, with respect to the rate of exchange and interest which had been provided in Section III, for it is stated in paragraph 14 that in the settlement under Article 249 where a Power has not made a declaration adopting Section III, which is the case of the United States, and between the respective nationals, that is, between the nationals of the United States and the nationals of Austria, "the provisions of Section III respecting the currency in which payment is to be made and the rate of exchange and of interest shall apply unless the Government of the Allied or Associated Power concerned shall within six months of the coming into force of the present Treaty, notify Austria that one or more of the said provisions are not to be applied". No one would contend, or could contend, that the United States had given any such notice. Accordingly, the citizens of the United States, in enforcing their rights under the Trading With the Enemy Act, conserved by the Treaty of Vienna, making applicable the provisions of the Treaty of St. Germain, are entitled to have the rate of exchange and of interest applied which are specified in the provisions of Section III.

Turning then to the provisions of Section III, thus incorporated by reference in paragraph 14 of the Annex following Article 250, the following provision is found in sub-division (d):

"(d) Debts shall be paid or credited in the currency of such one of the Allied and Associated Powers, their colonies or protectorates, or the British Dominions or India, as may be concerned.

If the debts are payable in some other currency they shall be paid or credited in the currency of the country concerned, whether an Allied or Associated Power, Colony, Protectorate, British Dominion or India, at the pre-war rate of exchange.

For the purpose of this provision the pre-war rate of exchange shall be defined as the average cable transfer rate prevailing in the Allied or Associated country concerned during the month immediately preceding the outbreak of war between the said country concerned and Austria-Hungary.

If a contract provides for a fixed rate of exchange governing the conversion of the currency in which the debt is stated into the currency of the Allied or Associated country concerned, then the above provisions concerning the rate of exchange shall not apply.

In the case of the new States of Poland and Czechoslovak State the currency in which and the rate of exchange at which debts shall be paid or credited shall be determined by the Reparation Commission provided for in Part VIII, unless they shall have been previously settled by agreement between the states interested."

And the following provision is found in paragraph 22 of the Annex to Article 248:

"Subject to any special agreement to the contrary between the Governments concerned, debts shall carry interest in accordance with the following provisions:

Interest shall not be payable on sums of money due by way of dividend, interest or other periodical payments which themselves represent interest on capital.

The rate of interest shall be 5 per cent. per annum except in cases where, by contract, law or custom, the creditor is entitled to payment of interest at a different rate. In such cases the rate to which he is entitled shall prevail.

Interest shall run from the date of commencement of hostilities (or, if the sum of money to be recovered fell due during the war, from the date at which it fell due) until the sum is credited to the Clearing Office of the creditor.

Sums due by way of interest shall be treated as debts admitted by the Clearing Office and shall be credited to the Creditor Clearing Office in the same way as such debts."

Thus, under paragraph (d) above quoted, American nationals are entitled to the pre-war rate of exchange and, under paragraph 22 above quoted, the rate of interest is defined.

In its opinion in the instant case the Circuit Court of Appeals said, 7 Fed. (2d) 445:

"There are several matters discussed at bar as to which discussion in this Court may cease; we have expressed views which will remain in force until corrected by higher authority. \* \* \* That the provisions of the Versailles Treaty do not affect nor relate to claims like that against the Deutsche Bank we have already so held in the *Guinness* case, *supra*."

The terms of the Treaty of Versailles are *mutatis mutandis*, the same as those of the Treaty of St. Germain in this regard, Articles 248, 249 and 250 of the Treaty

of St. Germain corresponding, respectively, to Articles 296, 297 and 298 of the Treaty of Versailles.

It is quite evident that the Circuit Court of Appeals in the *Guinness* case did not understand the provisions of the Treaty of Versailles and failed to give them appropriate effect. Thus, it is said that it was recognized that the plan of Article 296 (Clearing Office plan) had not been adopted by the United States. And reference is made to the provision of paragraph 14 of the Annex to Article 296, above quoted. But, when the Court came to deal with Article 296, it apparently failed to appreciate the terms of that Article, for the Court says at 299 Fed. 242, 243:

"Article 296 has no reference to payment of debts of Germans due an American. In part of Section IV of Article 296, which is headed 'Property Rights and Interest', provision is made for dealing with and liquidation of property belonging to nationals of allied and associated powers who were in Germany during the war, or property of Germans which was within the territory of the allied and associated powers during the war. It is true that sub-division 14 of the Annex to Section IV includes debts, credits, and accounts, but that is a provision under Article 297, which does not deal with the payment of debts between nationals of various powers, shall include within its scope not only tangible property within the various countries, but also intangible. Credits are made property within the meaning of Article 297 between Germany and the associated states and between their respective nationals. The provision of Section III respecting currency in which payment is to be made and the rate of exchange and interest shall apply unless the governments of the

allied and associated powers concerned shall, within six months of the coming into force of the present treaty, notify Germany that such provisions are not to be applied. Sub-division 14 provides that in the settlement of matters provided for in Article 297, the provisions as to the rate of exchange and interest provided for in Section III shall apply. And Article 297 provides for the liquidation by the allied and associated powers of all property rights and interest belonging, at the time of the coming into force of the present treaty, to German nationals and companies controlled by them within the territories of the allied and associated powers. Thus the provisions as to the rate of interest and exchange provided for in Section III are made applicable to Article 297 by Sub-division 14 of the Annex to Section IV, namely, in the instance of the liquidation of properties of Germans within the United States.

Sub-division E of Article 297 provides that nationals of the Allied and Associated Powers shall be entitled to compensation with respect to damage or injury inflicted upon their property rights or interests, including any company or association in which they are interested in German territory as it existed on August 1, 1914. This is another instance where the rate of exchange and interest applied, namely, where Germany liquidates the property of American nationals where the property was in Germany as of August 1, 1914, Germany must use the rate of exchange and interest provided for in Section III. We regard these provisions of Article 297 as having no application to a suit under Section 9 of the Trading with the Enemy Act, when the purpose of the suit is to collect a debt owing to an American



citizen out of the property of an enemy in the United States, where the property has been seized by the Alien Property Custodian and now held by the Treasurer of the United States. The rate of exchange is in no way provided for, if such procedure is instituted under Article 297 of the Treaty of Versailles."

This quotation, dealing with Article 297, starts out with the extraordinary statement: "Article 297 has no reference to payment of debts of Germans due an American." Counsel confess that they are unable to understand this statement, as paragraph 4 of the Annex following Article 298, which is ordinarily called the Annex to Article 297, was inserted for the express purpose of protecting debts due by Germans to Americans. That was not only the purpose but that is the explicit provision of the Article. In view of this misconception, it is hardly necessary to follow the reasoning of the Court, for it was obviously mistaken. The Court deals with paragraph 14 of the Annex following Article 298, called the Annex to Section IV, but disposes of it by saying that "that is a provision under Article 297, which does not deal with the payment of debts between nationals of various Powers", whereas Article 297, as we have shown, deals expressly with the debts due the nationals of the United States as an Associated Power from German nationals and deals with these debts in relation to the liquidation of property of German nationals held by the United States. By taking debts due from Germans to citizens of the United States out of Article 297, the Court below would defeat the whole purpose of this part of the Treaty of Versailles negotiated by the American Government, and, while not ratified, saved in these provisions by the Treaty

of Berlin. The Court of Appeals concludes its statement by saying, after referring to sub-division (e) of Article 297, that it regards these provisions as having no application to a suit under Section 9 of the Trading With the Enemy Act, when the purpose of the suit is to collect a debt owing to an American citizen out of the property of an enemy in the United States, where the property has been seized by the Alien Property Custodian and now held by the Treasurer of the United States. But the provisions of Article 297, that is to say, of paragraph 4 of the Annex following Articles 297 and 298, and referred to in Article 297, apply expressly to the case of a debt owing to an American citizen which is to be satisfied out of the property of an enemy in the United States and are intended directly to apply to the case where property had been seized by the Alien Property Custodian and now held by the Treasurer of the United States. Section 9 of the Trading With the Enemy Act is a method adopted by the United States to permit an American citizen to get his debt out of the property of a German national, and is contemplated by the Treaty of Versailles and the Treaty of Berlin.

It should be borne in mind that in considering the rights of the parties under the Treaty of Vienna applying the provisions of the Treaty of St. Germain, the question as to whether or not the debt owed by the Austrian defendant to the plaintiffs was due on any particular date is irrelevant. Paragraph 22 of the Annex (Section III) to Article 248 of the Treaty of St. Germain, relating to interest, is made applicable by paragraph 14 of the Annex in Section IV (following Article 250), and paragraph 22 expressly covers the cases of debts falling due during the war. Such debts are clearly within paragraph 4 of the Annex following Article 250 as being debts to

the payment of which property held by the Alien Property Custodian may be applied. The purpose of Section 9 of the Trading With the Enemy Act is to cover such cases. Plaintiffs clearly have a right, under Section 9 of the Trading With the Enemy Act to bring an action against the Alien Property Custodian to establish a debt owing to them by the Austrian national. While there is a restriction that such debt must have been owing to and owned by them on October 6, 1917, there is no limitation requiring that it must have been due prior to that date or at any particular date. The debts defined in paragraph 4 of the Annex to Article 249 (following Article 250) of the Treaty of St. Germain, are "debts owing" to American nationals by Austrian nationals, and by the express words of paragraph 14 of the same Annex the provisions of Article 249 are made to apply to "debts, credits and accounts". There is no limitation in this section of the Treaty which requires proof that the debt be due on any particular date. The only significance of the question as to whether or not the debt was due arises in determining under the common law and aside from treaties the rate of exchange at which the debt shall be paid. If the plaintiffs below are compelled to rely alone upon their rights at common law and aside from treaties to establish the debt claimed under Section 9 of the Trading With the Enemy Act, the question of the due date of the debt is relevant to determine the rate of exchange applicable and the date from which interest shall run. However, since the Treaty (par. 14, Annex Section IV applying Article 248 (d), Section III) specifically directs the application of a uniform rate of exchange to all debts owing by Austrian nationals to American nationals and to all credits and accounts, whether due or not, it seems clear that the only evidence neces-

sary to establish the plaintiffs' case is to prove a debt owing from the Austrian defendant to the plaintiffs, which was owned by them prior to October 6, 1917. This has concededly been done. We submit that under the Treaty between the United States and Austria of August 24, 1921, which is law in this country, the plaintiffs have the above described rights with reference to rate of exchange and rate of interest.

In the recent case of *United States of America v. Chemical Foundation*, decided by this Court, October 11, 1926, Mr. Justice Butler speaking for the Court, said:

"There is no support for a construction that would restrain the force of the broad language used. Congress was untrammelled and free to authorize the seizure, use or appropriation of such properties without any compensation to the owners. There is no constitutional prohibition against confiscation of enemy properties. *Brown v. United States*, 8 Cranch, 110, 122, 8 L. Ed. 504, 508; *Miller v. United States* (*Page v. United States*), 11 Wall. 268, 305, *et seq.*, 20 L. Ed. 135, 144; *Kirk v. Lynd*, 106 U. S. 315, 316, 27 L. Ed. 193, 1 Sup. Ct. Rep. 296; *Stoehr v. Wallace*, 255 U. S. 239, 245, 65 L. Ed. 604, 612, 41 Sup. Ct. Rep. 293; *White v. Mechanics Securities Corp.*, 269 U. S. 283, 300, 70 L. Ed. 275, 279, 46 Sup. Ct. Rep. 116. And the Act makes no provision for compensation. The former enemy owners have no claim against the patents or the proceeds derived from the sales. It makes no difference to them whether the consideration paid by the Foundation was adequate or inadequate. *The provision that after the war enemy claims shall be settled as Congress shall direct conferred no rights upon such owners. More-*

*over, the Treaty of Berlin prevents the enforcement of any claim by Germany or its nationals against the United States or its nationals on account of the seizures and sales in question.”\**  
(Italics ours.)

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\* Part X, Sec. IV, Art. 297, and Annex PP 1 and 3, Treaty of Versailles, adopted by Article II (1), Treaty of Berlin, 42 Stat. at L. 1939, 1943.

This Part X, Sec. IV, Art. 297 and the Annex thereto of the Treaty of Versailles adopted by Article II (1) Treaty of Berlin, 42 Statutes at Large 1939, 1943, is identical with the portion of the Treaty of St. Germain upon which plaintiffs here rely in their contention for the payment of this kronen debt at a pre-war rate of exchange. If, as this Court said in the *Chemical Foundation* case, the Treaty of Berlin *prevents the enforcement of any claim by German nationals against American nationals on account of seizures and sales of property taken over by the Alien Property Custodian* it must affect private rights, and in fact must on the one hand annul and on the other hand grant private rights. And so with the Treaty of Vienna.

Again in *White v. Mechanics Securities Corporation*, 269 U. S. 283, decided December 14th, 1925, this Court has recognized the effect of the Treaty of Berlin. In that case the suits were brought under the Trading With the Enemy Act upon notes issued by the Imperial German Government and alleged to have been recognized by the present German Government. They sought to collect the amounts of the notes from funds alleged to have belonged to the Imperial German Government and taken over by the Alien Property Custodian. Mr. Justice

Holmes, speaking for the Court said, concerning the seizure of "enemy" funds by the Alien Property Custodian:

"The funds were seized adversely by the United States in time of war. They are in its hands; it has declared by an act of Congress what shall be done with them, and that is the end of the matter. There is no question that such a seizure and disposition are within its powers. *Brown v. United States*, 8 Cranch, 110, 129, 3 L. Ed. 504, 510; *Miller v. United States* (*Page v. United States*), 11 Wall. 268, 20 L. Ed. 135. The Treaty with Germany has recognized their effect. Article 1 according the rights asserted by the joint resolution of July 2, 1921, Sec. 5, recited in the Treaty, 42 Stat. at L. 1939."

The idea of enforcing through local courts substantive rights which were vested by treaty has not only occurred to and been followed by courts and counsel in the past in respect of early treaties to which the United States was a party (cases cited at beginning of this point) but was undoubtedly entertained by the framers of the Treaty of St. Germain. For instance, Articles 248 and 249 of that treaty may be both briefly and accurately described as co-ordinate articles, where Article 248 provides for a clearing office system as a remedial instrument which may be used by any party to the treaty electing so to do, whereas Article 249 leaves to the Allied and Associated powers and their nationals the determination of the instruments through which rights conferred or confirmed by the treaty shall be enforced. A specific instance of such a situation, even as regards nationals of a country which ratified the Treaty of Versailles, is found in Article 297 of that treaty in the provision that where property

of Allied or Associated nationals is not restored by Germany the owner may claim restitution or compensation. There is no machinery created for the enforcement of such claims and Mr. E. J. Schuster, in his article "The Peace Treaty in its Effects on Private Property" in the *British Year Book of International Law*, 1920-1921, page 182, says that the above mentioned "right to restitution would have to be enforced through the ordinary channels" even by British subjects.

We may be certain, that with the crowd of matters which required adjustment, no vain word is spoken in the treaty. Each clause was intended to have meaning and effect.

The clauses which we have quoted can have, we submit, only a single meaning, the meaning which we have attributed to them, and which they quite clearly express. And this, moreover, is supported by the history of events which are still so recent that they are fresh in memory. That there was a strong sentiment in the United States against the relinquishment of property seized by the Alien Property Custodian is evidenced by Section 5 of the joint resolution of Congress which declared the peace almost three years after the Armistice (42 Stat. L. 105). It could scarcely be stronger at the time of the formulation of the Treaty of St. Germain, and it certainly was not weaker at that time. To release seized property to be dealt with by an International Clearing Office was so contrary to the feeling prevailing in the United States that the American delegates to the Peace Conference necessarily had to insist upon a provision allowing any country to retain the seized property and itself administer it. In doing so, however, they had equally to insist that American creditors should be given the same rights as they would have were the property administered by an

International Clearing Office. The provisions which we have quoted were obviously inserted with that purpose and effect. They have become the law of the land through their incorporation into the Treaty of Peace between the United States and Austria. This is established, we think, beyond question by the authorities.

It seems scarcely necessary to go further than this, but there have been in the past some very interesting and enlightening cases in which this Court has enforced private rights conferred by treaty and in which it has recognized the right of a Government to bind its nationals to the extent not only of sacrificing their rights *in rem*, but even of nullifying rights *in personam*.

In *Doe on the Demise of Clark, et al. v. Braden*, 16 How. 635, the suit arose out of the treaty of 1819 with Spain by which Florida was ceded to the United States. An action of ejectment was instituted, the plaintiff claiming title, under a grant from the King of Spain to the Duke of Alagon. The grant in question had been made prior to ratification of the treaty, but after the King of Spain had authorized his minister to negotiate it and after negotiations had actually commenced. It was insisted by representatives of the United States that an article should be inserted whereby this grant should be annulled by the Spanish Government, and accordingly such clause was inserted. Before ratifications were exchanged, the Duke informed the Secretary of State that he intended to rely upon the conveyance theretofore made to him. In the formal ratification by the Spanish King it was stated that this grant was annulled and that the grantee and those claiming title under him could not avail



themselves of the grant at any time. It was claimed by the plaintiff that the King of Spain had no power according to the Constitution of that country to annul this grant. In discussing this question, the Court said, at page 657:

"It is said, however, that the King of Spain, by the constitution under which he was then acting and administering the government, had not the power to annul it by treaty or otherwise; that if the power existed anywhere in the Spanish government it resided in the cortes; and that it does not appear, in the ratification, that it was annulled by that body or by its authority or consent.

But these are political questions and not judicial. They belong exclusively to the political department of the government."

It was further said, in the same connection, at pages 657 to 658:

"The treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States. It is their duty to interpret it and administer it according to its terms. And it would be impossible for the executive department of the government to conduct our foreign relations with any advantage to the country, and fulfill the duties which the Constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its constitution

and laws, to make the engagements into which he entered.

In this case the King of Spain has by the treaty stipulated that the grant to the Duke of Alagon, previously made by him, had been and remained annulled, and that neither the Duke of Alagon nor any person claiming under him could avail himself of this grant. It was for the President and Senate to determine whether the king, by the constitution and laws of Spain, was authorized to make this stipulation and to ratify a treaty containing it. They have recognized his power by accepting this stipulation as a part of the compact, and ratifying the treaty which contains it. The constituted and legitimate authority of the United States, therefore, has acquired and received this land as public property. In that character it became a part of the United States and subject to and governed by their laws. And as the treaty is by the constitution the supreme law, and that law declared it public domain when it came to the possession of the United States, the courts of justice are bound so to regard it and treat it, and cannot sanction any title not derived from the United States.

Nor can the plaintiff's claim be supported unless he can maintain that a court of justice may inquire whether the President and Senate were not mistaken as to the authority of the Spanish monarch in this respect; or knowingly sanctioned an act of injustice committed by him upon an individual in violation of the laws of Spain. But it is evident that such a proposition can find no support in the Constitution of the United States; nor in the jurisprudence of any country where the judicial and political powers

are separated and placed in different hands. Certainly no judicial tribunal in the United States ever claimed it, or supposed it possessed it.

\* \* \* It was a part of the territory of Spain, and in her possession and under her government, until the ratifications of the treaty were exchanged. And until that time the rights of the individual owner, and the extent of authority which the government might lawfully exercise over it, depended altogether upon the laws of Spain. And whatever rights he may have had under the deed of the Duke of Alagon, they were extinguished by the government from which he held them while the land remained a part of its territory and subject to its laws. It was public domain when it came to the possession of the United States, and he had then no rights to it."

This case of *Doe v. Braden* was cited with approval by this Court in the recent case entitled *United States of America v. State of Minnesota*, 270 U. S. 181, at 201, where the Court said:

"But while the earnestness of counsel has induced us to examine the basis of the argument advanced, there is another reason why the effort to overcome the cession must fail. Under the Constitution the treaty-making power resides in the President and Senate, and when through their action a treaty is made and proclaimed it becomes a law of the United States, and the courts can no more go behind it for the purpose of annulling it in whole or in part than they can go behind an act of Congress. Among the cases applying and enforcing this rule, some are particularly in point here. In *United States*

v. *Brooks*, 10 How. 442, 13 L. Ed. 489, where a grant made to certain individuals by the Caddo Indians in a treaty between them and the United States was assailed by the United States as induced by fraud practised on the Indians, the court held that 'the influences which were used to secure' the grant could not be made the subject of judicial inquiry for the purpose of overthrowing the treaty provision making it. In *Doe ex dem. Clark v. Braden*, 16 How. 635, 14 L. Ed. 1090, a provision in the treaty whereby Spain ceded Florida to the United States which annulled a prior grant to the Duke of Alagon was assailed as invalid on the ground that the King, who made the treaty, was without power under the Spanish Constitution to annul the grant. But the court refused to go behind the treaty and inquire into the authority of the King under the law of Spain, and this because, as was explained in the decision, it was for the President and Senate to determine who should be recognized as empowered to represent and speak for Spain in the negotiation and execution of the treaty, and as they had recognized the King, as possessing that power, it was not within the province of the courts to inquire whether they had erred in that regard. And in *Fellows v. Blacksmith*, 19 How. 366, 372, 15 L. Ed. 684, 686, where a treaty with the New York Indians was asserted to be invalid on the ground that the Tonawanda band of Senecas was not represented in the negotiation and signing of the treaty, the court disposed of that assertion by saying: 'But the answer to this is, that the treaty, after executed and ratified by the proper authorities of the government, becomes the su-

preme law of the land, and the courts can no more go behind it for the purpose of annulling its effect and operations than they can go behind an act of Congress.' The propriety of this rule and the need for adhering to it are well illustrated in the present case, where the assault on the treaty cession is made seventy years after the treaty and forty years after the last instalment of the stipulated compensation of approximately \$1,200,000 was paid to the Indians."

Article IV of the Definitive Treaty of Peace between the United States and Great Britain, concluded at Paris September 3, 1783, reads as follows:

"It is agreed that creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted. (Malloy, 'Treaties, Conventions, international Acts, Protocols and Agreements between the United States and other powers, 1776-1909', Vol. I, page 586.)"

The leading case under this article of the treaty is that of *Ware v. Hylton* (1796), 3 Dallas 199, in which the question before the Court was, as stated by Mr. Justice Chase, "whether the 4th article of the said treaty nullifies the law of Virginia, passed on the 20th of October, 1777; destroys the payment made under it; and revives the debt, and gives a right of recovery thereof, against the original debtor?" It was held that it did all these, including the destruction of the *personal right* of discharge from debt.

After quoting from the sixth article of the Consti-

tution, which provides "that all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding", Mr. Justice Chase proceeds as follows, at page 238:

"I will now proceed to the consideration of the treaty of 1783. It is evident, on a perusal of it, what were the great and principal objects in view by both parties. There were four on the part of the United States, to wit: 1st. An acknowledgment of their independence by the crown of Great Britain. 2d. A settlement of their western bounds. 3d. The right of fishery. And 4th. The free navigation of the Mississippi. There were three on the part of Great Britain, to wit: 1st. A recovery by British merchants, of the value in sterling money, of debts contracted, by the citizens of America, before the treaty. 2d. Restitution of the confiscated property of real British subjects, and of persons resident in districts in possession of the British forces, and who had not borne arms against the United States; and a conditional restoration of the confiscated property of all other persons. And 3d. A prohibition of all future confiscations and prosecutions. The following facts were of the most public notoriety, at the time when the treaty was made, and therefore, must have been very well known to the gentlemen who assented to it. 1st. That British debts, to a great amount, had been paid into some of the State treasuries, or loan-offices, in paper money of very little value, either under laws confiscating debts, or

under laws authorizing payment of such debts in paper money, and discharging the debtors. 2d. That tender laws had existed in all the States; and that by some of those laws, a tender and a refusal to accept, by principal or factor, was declared an extinguishment of the debt. From the knowledge that such laws had existed, there was good reason to fear, that similar laws, with the same or less consequences, might be again made (and the fact really happened), and prudence required to guard the British creditor against them. 3d. That in some of the States, property of any kind might be paid, at an appraisement, in discharge of any execution. 4th. That laws were in force in some of the States, at the time of the treaty, which prevented suits by British creditors. 5th. That laws were in force in other of the States, at the time of the treaty, to prevent suits by any person, for a limited time. All these laws created legal impediments, of one kind or another, to the recovery of many British debts, contracted before the war; and in many cases compelled the receipt of property instead of gold and silver."

and further, at pages 240-241:

"I will examine the 4th article of the treaty in its several parts; and endeavor to affix the plain and natural meaning of each part. To take the 4th article, in order as it stands:

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3d. 'Shall meet with no lawful impediment', that is, with no obstacle (or bar) arising from the common law, or acts of Parliament, or acts of Congress, or acts of any of the States, then in existence, or thereafter to be made, that would,

in any manner, operate to prevent the recovery of such debts as the treaty contemplated. A lawful impediment to prevent a recovery of a debt can only be matter of law, pleaded in bar to the action. If the word lawful had been omitted, the impediment would not be confined to matter of law. The prohibition that no lawful impediment shall be interposed is the same as that all lawful impediments shall be removed. The meaning cannot be satisfied by the removal of one impediment, and leaving another; and a fortiori, by taking away the less and leaving the greater. These words have both a retrospective and future aspect.

4th. 'To the recovery', that is, to the right of action, judgment and execution, and receipt of the money, without impediments in courts of justice, which could only be by plea (as in the present case), or by proceedings, after judgment, to compel receipt of paper money or property, instead of sterling money. The word recovery is very comprehensive, and operates in the present case, to give remedy from the commencement of suit, to the receipt of the money.

5th. 'In the full value in sterling money', that is, British creditors shall not be obliged to receive paper money, or property at a valuation, or anything else but the full value of their debts, according to the exchange with Great Britain. This provision is clearly restricted to British debts, contracted before the treaty, and cannot relate to debts contracted afterwards, which would be dischargeable according to contract, and the laws of the State where entered into. This provision has also a future aspect in this particular, namely, that no lawful im-



pediment, no law of any of the States made after the treaty, shall oblige British creditors to receive their debts, contracted before the treaty, in paper money, or property at appraisement, or in anything but the value in sterling money. The obvious intent of these words was, to prevent the operation of past and future tender laws; or past and future laws, authorizing the discharge of executions for such debts by property at a valuation."

And at page 245:

"It was said, that the defendant ought to be fully indemnified, if the treaty compels him to pay his debts over again; as his rights have been sacrificed for the benefit of the public. *That congress had the power to sacrifice the rights and interests of private citizens, to secure the safety or prosperity of the public, I have no doubt;* but the immutable principles of justice; the public faith of the states that confiscated and received British debts, pledged to the debtors; and the rights of the debtors, violated by the treaty; all combine to prove, that ample compensation ought to be made to all the debtors who have been injured by the treaty, for the benefit of the public. This principle is recognized by the constitution, which declares, 'that private property shall not be taken for public use without just compensation'. See Vattel, lib. 1, c. 20, Sec. 244. Although Virginia is not bound to make compensation to the debtors, yet, it is evident, that they ought to be indemnified, and it is not to be supposed, that those whose duty it may be to make the compensation, will permit the rights of our citizens to be

sacrificed to a public object, without the fullest indemnity." (*Italics ours.*)

It may be noted that Austria, in the Treaty of St. Germain, Art. 249 (j), undertook to compensate her nationals for losses suffered by reason of the sale or retention of their property, rights or interests in Allied or Associated States.

In *United States v. The Schooner Peggy*, 1 Cranch. 103, this Court construed the provisions of the convention between the United States and France of September 30, 1800 for the mutual restoration of property captured but not "definitively" condemned. The convention having intervened since the judgment below it was held that the Supreme Court was bound to order the restoration without regard to the merits of the judgment. Chief Justice Marshall delivered the opinion of the Court and said at page 110:

"But yet, where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights, and is as much to be regarded by the court, as an act of Congress; and although restoration may be an executive when viewed as a substantive act, independent of, and unconnected with, other circumstances, yet to condemn a vessel, the restoration of which is directed by a law of the land, would be a direct infraction of that law, and of consequence, improper.

It is, in the general, true, that the province of an appellate court is only to inquire whether a judgment, when rendered, was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes

and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt, in the present case, has been expressed, I know of no court which can contest its obligation. It is true, that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns, where individual rights, acquired by war, are sacrificed for national purposes, the contract making the sacrifice ought always to receive a construction conforming to its manifest import; and *if the nation has given up the vested rights of its citizens*, it is not for the court, but for the Government to consider whether it be a case proper for compensation. In such a case, the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed, but in violation of law, the judgment must be set aside." (Italics ours.)

In *United States v. Percheman*, 7 Pet. 51, there was involved a construction of the treaty of February 22, 1819, between the United States and Spain, by which Florida was ceded to the United States. The plaintiff claimed certain land lying in this territory by virtue of a grant from a duly accredited Spanish authority in 1815. The eighth clause of the treaty provided in substance that all grants made prior to January, 1818 by the Spanish authorities in the Florida territory "shall be ratified and confirmed to the persons in possession of the land".

It was held (reversing a previous decision to the contrary in 2 Pet. 253) that the treaty provision was self-executing. The court said at page 89:

“Although the words ‘shall be ratified and confirmed’ are properly the words of contract, stipulating for some future legislative act; they are not necessarily so. They may import that ‘they shall be ratified and confirmed’ by force of the instrument itself. When we observe that in the counterpart of the same treaty, executed at the same time by the same parties, they are used in this sense, we think the construction proper, if not unavoidable.”

Also to this effect:

*Georgia v. Brailsford*, 3 Dall. 1;

*Edye v. Robertson* (Head Money Cases) 112 U. S. 580;

*Hauenstein v. Lynham*, 100 U. S. 483;

*Whitney v. Robertson*, 124 U. S. 190.

We submit, and believe that it is self-evident, that the agreement signed at Washington, November 26, 1924 (Treaty Series No. 730), between the United States and Austria and Hungary, for the determination of the amounts to be paid by Austria and by Hungary, in satisfaction of their obligations under the treaties concluded by the United States with Austria on August 24, 1921, and with Hungary on August 29, 1921, does not affect rights acquired by plaintiffs and liabilities imposed upon defendants by the Trading With the Enemy Act and the Treaty of Vienna of August 24, 1921. It is obvious that the agreement of November 26, 1924, did not even attempt to deal with substantive rights.

### POINT III.

**There was a breach on or about August 6, 1919, following demand on defendant bank, if it should be held that an obligation to pay did not exist there-  
tofore.**

On August 6, 1919, the plaintiffs cabled the defendant bank as follows:

"Referring to our old balance will you consent to American Alien Property Custodian paying us out of your former funds in his custody equivalent in dollars at March fifteenth nineteen seventeen rate of eleven eighteen stop if you agree wire us to that effect and we will send you necessary papers to be filled out and signed by you stop this will obviate lawsuit which we otherwise be compelled to institute" (R., 109-110).

The defendant bank failed to understand this cable:

"as at that time we never thought it possible that the Peace Conference would demand that pre-war balances will have to be settled at the pre-war rate of exchange" (R., 110).

The bank therefore cabled the plaintiffs on August 12, 1919 in reply as follows:

"Your cable regarding our consent to custodian incomprehensible wire details and reasons and transactions concerned."

We respectfully submit that this cable had the effect of maturing the debt of the defendant bank to the plain-

tiffs if it should be held that such an obligation to pay did not exist theretofore.

Counsel for the bank have claimed that the above quoted cable of August 6, 1919, which was held by the District Court to be a demand, did not constitute a proper demand because it demanded more than the District Court subsequently held was due at that time.

However, the case of *Robertson v. Miller*, 266 U. S. 243, is direct authority for the proposition that a proper demand may be made for an amount in excess of that actually due. The record in the *Robertson* case shows that the demand made on the defendant, Beer Sondheimer & Company, by the attempted service of a summons and complaint, demanded the sum of \$272,824.88, although the Master found that the amount actually due was only \$259,597.21. Yet, this Court held that the demand made by the service of such summons and complaint was a proper demand to make the amount due and to start interest running from the date thereof.

The defendant bank refers to this demand as "a mere inquiry". Mere inquiries do not ordinarily end with the statement that "this will obviate law suit which we otherwise be compelled to institute".

#### POINT IV.

**Interest should be allowed both under treaty and aside from treaty upon the indebtedness owing to the plaintiffs by the defendant bank from the due date of the principal amount.**

So far as our efforts have disclosed, there are only four decisions of this Court on the question of interest

to be allowed during war upon debts owing by a citizen of one belligerent country to a citizen of another. We summarize their holdings as follows:

(1) Where an action is brought to recover a personal judgment upon a debt from a citizen of one belligerent to a citizen of another which fell due at a time when war was waging in actual hostilities and had not borne interest, by its terms, prior to the time of maturity, interest may not be recovered for the period prior to the cessation of hostilities where the law of the country in which the debtor resides forbids payments of the debt during hostilities and where that country is the country of the forum. *Brown v. Hiatts*, 15 Wall. 177.

(2) In the event, however, that upon the falling due of such a debt during the period of war, the enemy creditor has an agent in the country of the debtor to receive payment of the debt, interest will run if the payment is not made. The war is not deemed to terminate the agency established by the enemy creditor for the purpose of receiving payment of the debt. *Ward v. Smith*, 7 Wall. 447.

(3) In the event that the enemy debtor has property in the hands of an agent in the country of the creditor even though the agent has no authority to devote it to the payment of the debt, and is under instructions from his principal not to do so, interest will continue to run. *Miller v. Robertson*, 266 U. S. 243.

(4) Where the debt became due prior to the inception of a state of war and the suit is to apply to the debt property in the possession of the Alien Property Custodian and formerly belonging to the enemy debtor interest will run during the war regardless of whether the

enemy debtor had an agent in the country of the creditor. *Guinness v. Hicks*, 269 U. S. 71.

The English law in this regard is settled.

In *Hugh Stevenson & Sons, Limited v. Aktiengesellschaft fur Cartonnagen-Industrie* (1917), 1 K. B. 842, Swinfen Eady, *L.J.*, said at page 850:

"A debt which by law carries interest, and which is owing to an enemy, does not cease to carry interest by reason of the war, although the enemy cannot enforce payment until the return of peace. If the principal of the debt is not confiscated, why should the interest be confiscated? The learned Judge below said: 'Enemy property in this country is not to be confiscated'; yet the effect of the judgment is to confiscate the interest, as if the defendant had not been an enemy, he would certainly have claimed interest. In *Wolff v. Oxholm* (1817), 6 M. & S. 92, the plaintiffs recovered against the defendant, who had formerly been an enemy, a large sum for interest which accrued during the war. In like manner interest must run in favor of an enemy during the war, although not then actually payable to him."

This case was decided by the Court of Appeal with one dissenting Lord Justice, and was appealed to the House of Lords, where the decision was unanimously affirmed.

*Hugh Stevenson & Sons v. Aktiengesellschaft fur Cartonnagen-Industrie* (1918), A. C. 239, by Lord Chancellor Findlay, at page 245:

"This appears to me to follow from the principle that the property of an enemy is not con-



fiscated though his right to have it back is suspended during war. It was strenuously contended that in the case of a debt to a foreigner bearing interest, no interest could accrue during the existence of hostilities between the countries of the debtor and creditor, and in support of this proposition two American cases were cited, *Hoare v. Allen*, 2 Dall. 102, and *Brown v. Hiatts*, 15 Wall. 177, the latter a decision of the Supreme Court of the United States.

These decisions seem to me not to be in conformity with English law. The rule of international law on this point, in the view of the courts of this country, does not appear to have formed the subject of any express decisions in England. The judgment of Lord Ellenborough, however, in *Wolff v. Oxholm*, 6 M. & S. 92, appears to me to imply that, in the view of Lord Ellenborough, interest on such a debt would not cease to run during the continuance of the war, but the point does not appear to have been argued. It is difficult to see on what principle the interest is to be forfeited if private property is to be respected."

The plaintiffs here contend that the *Hiatts* and *Ward* cases are easily distinguishable from the instant case and that the instant case falls squarely within the rulings of this Court and of the highest court of England as rendered in *Miller v. Robertson*; *Guinness v. Hicks*, and *Stevenson v. Aktiengesellschaft*, *supra*.

In *Brown v. Hiatts* the action was brought to recover a personal judgment whereas in the instant case a judgment *in rem* is sought. There the debt had not borne interest by its terms prior to the time of maturity. Here

the debt had borne interest. There the law of the country in which the debtor resided forbade payment of the debt during hostilities and that country was the country of the forum. Here there was no Austrian law or decree forbidding payment, and Austria is not the country of the forum. In the *Brown* case the Court was not giving effect to a confederate statute or decree but was a Court of the United States enforcing a law of the United States with regard to a debtor who resided within the United States. The "interdiction" there mentioned was that of a law of the country of the forum and of the residence of the defendant.

Concerning *Ward v. Smith* the record does not show that the plaintiffs had an agent in the country of the debtor capable of receiving payment of the debt. This fact merely makes the *Ward* case unavailable to plaintiffs here.

In *Miller v. Robertson, supra*, the Court said:

"It would be unjust and inconsistent with the remedial purposes of Section 9 to hold that the seized enemy property cannot be held for the full amount of the seller's loss, and that, to the extent of interest during the period of the war compensation must be denied. The proposition that the enemy defendants, as a matter of law, are entitled to be relieved from interest during the war cannot be sustained."

Also:

"While the suit \* \* \* is one against the United States the claim was not against it. No debt was alleged to be owing from it to the plaintiff. The rule of sovereign immunity of liability for interest \* \* \* does not apply."

And the Court said in the course of its opinion, before stating the rule first quoted above, the following:

“One who has had the use of money owing to another justly may be required to pay interest from the time the payment should have been made. Both in law and in equity interest is allowed on money due. \* \* \*

It seems to us that this Court in the *Robertson* case intended to and did express the sound rule in this regard on principle and in general terms. However, if the significance of the decision in that case is restricted to the actual facts plaintiffs still contend that the instant case falls squarely within the ruling of the *Robertson* case because the debtor bank had property in the hands of an agent in this country which agent was capable of discharging the debt. Mr. Von Fest was the agent of the Wiener Bank-Verein in this country. He had full power to act for the bank, and he had in his control property from which he could have paid the debt here (R., p. 103).

Plaintiffs furthermore submit that the provisions of sub-section 8 (a) of the Trading With the Enemy Act make the Alien Property Custodian in matters of this nature the agent of the “enemy” in that notice to the Custodian is sufficient to terminate or mature a contract such as the one in the instant case. Certainly also the Custodian had in his hands property belonging to the defendant bank.

The *Guinness* case is also direct authority for plaintiffs’ contention. For in this connection Mr. Justice Holmes, speaking for this Court, said:

“The denial of interest for the time covered by the war seems to us wrong.

The cause of action had accrued before the war began, *Young v. Godbe*, 15 Wall. 562, 21 L. Ed. 250, and after it had accrued the question was no longer one of excuse for not performing a contract but of the continuance of a liability for damages that had become fixed. The obligation of a contract is subject to implied exceptions, but when a liability is incurred by wrong or default it is absolute. Interest is due as one of its incidentals, and inability to pay it no more excuses from that than it does from the principal amount. Of course while the damages remain unpaid interest during one time is as necessary as interest during another to effect the indemnification to which the delinquent is held by the law. There are indications that local and momentary interest have led to a diversity of decisions but here again what we regard as principle has prevailed in later days. *Miller v. Robertson*, 266 U. S. 243, 69 L. Ed. 265, 45 Sup. Ct. Rep. 73; *Hugh Sterenson & Sons v. Aktiengesellschaft für Cartonnagen-Industrie* (1918), A. C. 239, 245, Ann. Cas. 1918 D, 575-H. L., s. c. (1917) 1 K. B. 842, 850, 7 B. R. C. 600-C. A. The case of *Brown v. Hiatt*, 15 Wall. 177, 21 L. Ed. 128, although criticised in the last cited decision, is consistent on its facts with the principle adopted here, since war existed at the time when the cause of action otherwise would have accrued, and it very possibly might be held that war excuses the performance of a contract although it does not impair or diminish a liability already fixed by law."

The proceeding here, in the matter of interest, is just as much *in rem* as is the proceeding for the principal amount. The plea of the defendant bank, of its per-

sonal inability to pay interest by reason of the war, is not, we submit, any more or any less effective with regard to interest than it would be with regard to principal. Both transactions would involve payments of money and if the bank's contention has any force or effect in this Court it must affect both payments of principal and of interest. The principal involved has been in the hands of the Alien Property Custodian since it was taken over during the war and has earned interest. It is common knowledge that claims allowed by the Alien Property Custodian and the Department of Justice are allowed with interest. The defendant bank had the use of the plaintiffs' money in Vienna from April 6, 1917. The money was Austrian currency, which was capable of current use by the bank and no doubt was so used. The plaintiffs, on the other hand, were deprived of all use or control over the funds in question, and it is for this use that the plaintiffs now ask interest. We submit that while interest may be assessed as damages in the sense that it is added to a judgment which is in damages for breach of contract, the essential nature of interest is money paid for the use of money. That, of course, is the reason why in banking transactions it is only paid on accounts which are general and which are in money which is current in the place where it is situated.

We consequently submit that the instant case in the matter of interest is easily distinguished from the case of *Brown v. Hiatts* and that of *Ward v. Smith*, and falls squarely within the two other decisions of this Court in that regard, that is *Miller v. Robertson* and *Guinness v. Hicks*, and within the rule as stated by the English House of Lords in *Stevenson v. Aktiengesellschaft*.

The liability of the defendants for interest under the Treaty of Vienna, incorporating provisions of the Treaty

of St. Germain, has already been discussed in Sub-point II B, *supra*.

## POINT V.

**The deposit of depreciated kronen by the defendant bank with an Austrian court did not discharge the bank of its obligation to plaintiffs.**

In its first defense, which is the only one relied on, the defendant bank alleges that the deposit of kronen sued for by plaintiffs was made pursuant to an agreement and understanding that the mutual rights and obligations arising between plaintiffs and defendant bank should be governed by the laws of Austria; that at the time of said agreement and at all subsequent times the General Civil Law of Austria provided by Section 1425 as follows:

“If a debt cannot be paid because the creditor is unknown, absent, or dissatisfied with the offer, or because of other important reasons, the debtor may deposit in court the subject matter in dispute; or, if it is not susceptible of such action he may take legal steps for its custody. If legally carried out and the creditor has been informed thereof, either of these measures discharges the debtor of his obligation, and places the subject matter delivered at the risk of the creditor”;

that after July 14, 1919, and prior to April 1st, 1920, plaintiffs refused to accept the kronen on general deposit with defendant bank as offered, either in kronen or in United States currency, at the rate of exchange between the United States dollars and Austrian kronen then

prevailing, but demanded the amount of said kronen on deposit as of April 6, 1917, at the average cable transfer rate of exchange between United States dollars and Austrian kronen prevailing in the United States during the month immediately preceding the outbreak of war between the United States and Austria-Hungary, namely, 11.18 United States cents for each Austrian krone; that on or about April 1, 1920, the defendant bank deposited the number of kronen in its bank stated to be due and owing to the plaintiffs as of April 6, 1917, in the proper Court at Vienna and gave notice of such deposit to plaintiffs, and thereby became released in this cause of action.

We contend that if such a contract was so made between plaintiffs and defendant bank, it was absolutely terminated and dissolved by the inception of a state of war, by the international rule of non-intercourse between alien enemies, and by the prohibitory provisions of the Trading With the Enemy Act, as is set forth at length in Point II of this brief. We furthermore contend that the Austrian law and any act done under it must be ineffective and unavailing in view of the provisions of the Joint Resolution of Congress of July 2, 1921, and of the Treaty of Vienna, concluded between the United States and Austria, August 24, 1921, as is also set forth in Point II hereof.

This is not an action in the nature of a replevin action to recover property, title to which remained in plaintiffs. It is not a suit for performance of a contract, which suit might invoke Austrian law either under contract or as *lex loci solutionis*. Nor is the deposit of kronen in court by the defendant any part of the performance of the contract, even as stated by that bank.

On the contrary, it is a suit for breach of the obligation to pay 2,063,799 kronen. It is a suit brought by citizens and residents of the United States under a statute passed by reason of the existence of a state of war between the United States and Germany, when Austria was an "ally of enemy", to collect, at a pre-war rate of exchange, from property formerly belonging to the Wiener Bank-Verein and taken over by the Alien Property Custodian, a debt owing to the plaintiffs by the defendant bank in kronen. In providing through the Trading With the Enemy Act for the taking over of property of "enemies" and "allies of enemy", and, as a practical matter, thus depriving American citizens of their remedies through attachment or satisfaction of judgment, Congress within its power and authority as defined by the Constitution, provided for the recovery by American citizens, from property seized by the Alien Property Custodian, of claims which such citizens might have against "enemy" and "ally of enemy" subjects.

In so doing it divided possible claims into two general categories, the first of which comprises property rights and interests, and the second of which comprises debts. In Point I of this brief we have shown that this Court has held that the Trading With the Enemy Act and the word "debts" therein are to be liberally construed.

In this brief we have contended that the kronen here owed are payable at a pre-war rate of exchange under the Trading With the Enemy Act whether or not they were due. In addition, we have contended that, if it should not be so held, this debt was payable at a pre-war rate of exchange by reason of an account stated and a demand, and because the state of war, the inter-



national rule of non-intercourse between alien enemies, and the provisions of the Trading With the Enemy Act terminated the contract. We have also contended that regardless of these factors, the debt is clearly payable at a pre-war rate of exchange by reason of the Treaty of Vienna, entered into between the United States and Austria on August 24, 1921.

We consequently submit that the cause of action matured and crystalized in dollars under American law, and attached to property in this country, long before the deposit of kronen on April 1, 1920, and that, in these circumstances, the Austrian law relative to any deposit of kronen can have no significance.

As evidence that the defendant bank realized the soundness of this position even when it made its deposit of kronen, we quote the following sentence from the letter, dated April 1, 1920, from the defendant bank to the plaintiffs (Plaintiffs' Exhibit 1, R. 108, 110):

"We never thought it possible that the Peace Conference would demand that pre-war balances will have to be settled at the pre-war rate of exchange."

Even if the Austrian law pleaded by the defendant bank might be considered, in ordinary circumstances, to discharge that bank of any liability beyond the subject matter of the deposit, we insist that it cannot have such an effect here, because to do so would clearly render nugatory the provisions of the Treaty of Peace between the United States and Austria, known as the Treaty of Vienna, which became the law of Austria, as well as of the United States, and superseded any national law inconsistent therewith.

There have been other cases where in similar circumstances it was pleaded that debts were satisfied by payments by defendants into designated depositories in depreciated currency under statutes authorizing payment of such debts in depreciated money and discharging the debtors, and where a treaty superseded the statutes and rendered them and payments made thereunder ineffective and nugatory.

The leading case in this country is *Ware v. Hylton*, 3 Dall. 199, which has been mentioned heretofore. It is, however, a case dealing with a situation so similar to the present one that we take the liberty of again stating it. During the Revolutionary War, British debts to a great amount had been paid into loan offices "in paper money of very little value, either under laws confiscating debts, or under laws authorizing payment of such debts in paper money, and discharging the debtors" (p. 238). A statute of Virginia passed on October 20, 1777, was one of such laws. The question before the Court was, as stated by Mr. Justice Chase, page 234:

"Whether the fourth article of the said Treaty (United States and Great Britain—September 3, 1783) nullifies the law of Virginia passed on the 20th of October, 1777; destroys the payment made under it; and revives the debt, and gives a right of recovery thereof against the original debtor?"

Consequently, in that case a question was presented which was almost identical with that which is now before this Court. In fact, the situation from the point of view of the remedial aspects of the Treaty was certainly more difficult then than it is now, for the British debts had very largely been paid into loan offices and

state treasuries in paper money of depreciated value, under express provisions of law applicable to those specific debts, that such payments constituted a full discharge to the debtors. The language of Article IV of the Treaty in question was: "It is agreed that creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money of all bona fide debts heretofore contracted." This Court held that, with no enabling act to aid the Treaty in its execution, the language of the above quoted article *nullified* a state law providing that debts owing from American citizens to British subjects were discharged by payment into state "loan offices"; *destroyed* the payment made under it; *revived* the original debt; and *gave a right of recovery thereof* against the original debtor. We submit that this case, which has been followed many times, is controlling here.

In the British leading case of *Wolff, et al. v. Orholm* (1817), 6 Maule & Selwyn 92, it was held that it is no defense to an action for debt brought against an alien enemy that he has paid the debt into the treasury of his own country under an ordinance confiscating debts due to enemy subjects. Lord Ellenborough, *C. J.*, said, in the course of his opinion:

"And this brings us to the consideration of what is the material question in the cause, viz., the legal effect of the Danish ordinance of confiscation promulgated on the 16th of August, 1807, and the facts that took place after it, which constituted the main ground of the defense.  
 \* \* \* We think our judgment would be pregnant of mischief to future times if we did not declare that in our opinion this ordinance and the pay-

ment to the commissioners appointed under it do not furnish a defense to the present action."

## **POINT VI.**

### **Analysis of the equities.**

At first glance it may appear inequitable for the plaintiffs herein to seek to recover at a pre-war rate of exchange monies owing by an Austrian bank in kronen. We respectfully submit, however, that such is not the case. The kronen which are being sued for in this case were bought by the plaintiffs, with American dollars, at a pre-war rate of exchange and left on deposit with the defendant bank in order that they might be available for exchange transactions in which the plaintiffs were engaged. Prior to the entry of the United States into the war, plaintiffs attempted, as did many other financial houses, to exhaust their deposits of kronen in order that they might not have property in enemy countries in the event that a state of war arose. The usual custom then in making a foreign exchange transaction was to cable the foreign bank to pay a certain sum to a certain person, and following this custom plaintiffs sent to the telegraph companies cable messages which would have materially reduced the amounts of deposit in enemy countries, if they had been transmitted, and the instructions therein followed. However, in almost all, if not every instance, these cables failed in transmission through no fault of the plaintiffs, with the result that when the United States entered the war and communication was cut off with Austria because it was an ally of enemy and later an enemy country, these deposits had been reduced little, if any, in amount.

As time progressed after the entry of the United States into the war, it was apparent that if the recoveries of kronen deposits with Austrian banks could only be made at a post-war rate of exchange, the American creditors, having bought these kronen at a pre-war rate, would suffer tremendous losses. This situation was further aggravated by the institution of suits against the American creditors by depositors in this country to recover from such creditors the dollars which the depositors had delivered to the creditors for transmission of the equivalent in marks or kronen to Germany or Austria and by the almost uniform decisions of the courts in these suits in favor of the plaintiff depositors and against the creditors of the "enemy" banks (*e. g.*, *Gravenhorst v. Zimmermann*, 236 N. Y. 22; *Atlantic Communication v. Zimmermann*, 182 App. Div. 862). After the end of the war it became apparent that the courts of this country were going to hold the creditor banks here responsible for a repayment of the dollars and that if the banks could not recover their marks and kronen on deposit in Germany and Austria at a pre-war rate of exchange, but only at a post-war rate they would be forced, through no fault of their own, to take a loss which, today, amounts to more than \$999,930 on each \$1,000,000 invested in kronen.

When the Treaty of Versailles and the Treaty of St. Germain were negotiated it was apparent that marks and kronen had already fallen tremendously and that if they did not go lower it would probably be a very long time before they recovered to any appreciable extent. It was also foreseen that there were many instances, such as claims of this nature reveal, where, if the recovery of a debt owed in enemy currency by an enemy national to an allied or associated national, could only be made at a

rate of exchange prevailing at the time of the recovery, nationals of the allied or associated powers would be taking tremendous losses through no fault of theirs. In these circumstances, the framers of the Treaty of St. Germain inserted in that Treaty the provisions set forth in Point II of this brief making the property of Austrian debtors in the United States chargeable for these debts in the currency of the United States at a pre-war rate of exchange and recoverable in accordance with the laws of the United States, and then, in order to remove this loss and burden from the individual debtors, the Austrian Government undertook "to compensate her nationals in respect of the sale or retention of their property, rights or interests in Allied or Associated States" (Treaty of St. Germain, Article 249, Section (j)).

Having examined the situation with regard to the American creditors, it will be helpful to consider the practical situation from the viewpoint of the Austrian debtors in the event that debts of this nature are decreed to be payable in dollars at a pre-war rate of exchange from property in the possession of the Alien Property Custodian and formerly belonging to "enemy" debtors.

If satisfaction of these debts is decreed out of the individual trusts in the names of the Austrian debtors, no loss will be incurred by those debtors, because the property, either dollars or otherwise, standing in those trusts and so used was purchased by the debtors at a pre-war rate of exchange and is used to satisfy debts also at a pre-war rate. The situation, consequently, would be exactly the same as though those debtors had paid American creditors at a pre-war rate of exchange, then recovered their property from the Custodian and converted it into kronen or the equivalent thereof at a post-war rate of exchange. In fact, where the property

so used was purchased at a par rate of exchange of 20 cents per krone, or nearly so, the debtor banks would actually make on that transaction, because it would be used to satisfy debts at a rate of exchange of approximately 11 cents for each Austrian krone. For example, property valued at \$100,000 and which cost the Austrian debtors 500,000 kronen would be used to extinguish a debt of 909,090 kronen at a March, 1917, rate. In other words, no loss will fall upon the Austrian debtors or any Austrian nationals; and, with respect to any property which is not so used and consequently returned, the Austrian nationals will make more than \$999,930 on each \$1,000,000 at the present stabilized rate of exchange at which 1,000,000 kronen are worth \$14.12½ American. The Austrian krone now is out of circulation in Austria and is no longer currency there. It has been replaced by the Austrian shilling, worth 14⅛ cents American.

The utmost that can be said on behalf of the Austrian nationals, no matter what method of actual payment at a pre-war rate is employed, is that they may be deprived of any opportunity to take advantage of the present rate of exchange and recover 17,857,000,000 kronen from an investment which cost in 1916 or 1917 at the most 2,000,000 kronen, or, to put the matter in another form, the utmost that can be said on behalf of the Wiener Bank-Verein is that if the debt to the plaintiffs is paid at a pre-war rate of exchange it will merely be deprived of *some* of the enormous profits which have ensued by reason of the fact that its property in the United States was taken over by the Alien Property Custodian, acting for the United States Government and as a common law trustee, and was preserved in a currency which after the war had not only a high exchange value but a high purchasing value as well.

As explained above, the plaintiffs are faced today with an actual loss of over \$999,930 on every \$1,000,000 used to purchase kronen on deposit in Austria, and the Wiener Bank-Verein is faced with no loss if its debts are paid at a pre-war rate of exchange from seized property, thus taking the burden from the American creditors. At most, the Wiener Bank-Verein would be prevented from enormously profiting by the war, and it is respectfully submitted that, under no principle of equity, is it just and fair to force American creditors to accept these debts in kronen at a post-war rate of exchange, losing more than \$999,930 on each \$1,000,000 investment made in the regular course of their business to facilitate American commercial activities, and, at the same time, when all claims against the property of the Wiener Bank-Verein are terminated by such payments in depreciated currency, to allow that bank to recover its property and make, by reason of the war, more than \$999,930 on every \$1,000,000 or, translating it into kronen, to take a clear profit of over 17,855,000,000 kronen on every 2,000,000 kronen invested.

### **CONCLUSION.**

***The decree of the Circuit Court of Appeals  
should be reversed.***

Respectfully submitted,

CHARLES E. HUGHES,  
JOSEPH M. HARTFIELD,  
HAMILTON VREELAND, JR.,  
*Solicitors and Counsel for Appellants.*

February, 1927.



Office Supreme Court, U. S.

FILED

FEB 26 1927

WM. R. STANSBURY  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1926.  
No. 180.

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LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H. HAUSER,  
JOHN S. SCULLY, SIMON B. BLUMENTHAL, DAVID  
FORSHAY and ISAAC GUTENSTEIN, co-partners doing  
business under the firm name and style of ZIMMER-  
MANN & FORSHAY, as brokers,

Plaintiffs-Appellants,  
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HOWARD SUTHERLAND, as Alien Property Custodian of the  
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United States; and the WIENER BANK-VEREIN, of  
Vienna, Austria,

Defendants-Appellees.

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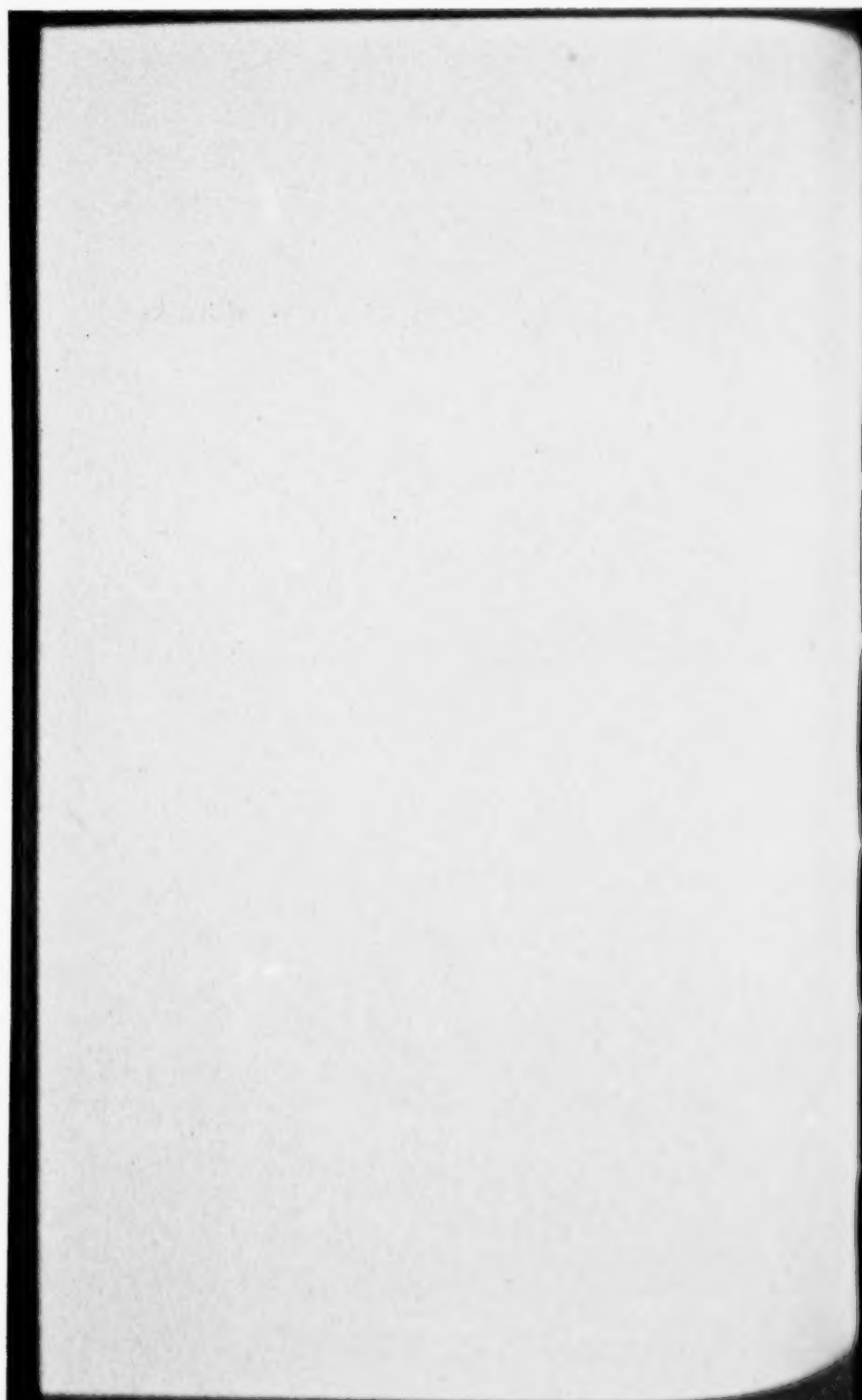
ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE SECOND CIRCUIT.

---

**BRIEF ON BEHALF OF APPELLEES.**

---

SAMUEL R. WACHTELL,  
Solicitor and Counsel for Appellee,  
Wiener Bank Verein.



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1926.

No. 180.

---

LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H. HAUSER,  
JOHN S. SCULLY, SIMON B. BLUMENTHAL, DAVID  
FORSILAY and ISAAC GUTENSTEIN, co-partners doing  
business under the firm name and style of ZIMMER-  
MANN & FORSHAY, as brokers,

Plaintiffs-Appellants,

against

HOWARD SUTHERLAND, as Alien Property Custodian of the  
United States; FRANK WHITE, as Treasurer of the  
United States; and the WIENER BANK-VEREIN, of  
Vienna, Austria,

Defendants-Appellees.

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ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE SECOND CIRCUIT.

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**BRIEF ON BEHALF OF APPELLEES.**

---

**Report of Opinions Below.**

The opinion of the Circuit Court of Appeals for the  
Second Circuit is reported under the title of *Zimmermann  
et al. v. Hicks et al.*, 7 Fed. (2nd Series) 443.

The opinion of the United States District Court for the Southern District of New York is reported under the title of *Zimmermann et al. v. Miller*, 2 Fed. (2nd Series) 29. Thomas W. Miller, who was Alien Property Custodian at the time the case was originally tried, was succeeded by Frederick C. Hicks, who was Custodian at the time the appeal was heard in the Circuit Court. He has, in turn, been succeeded by Howard Sutherland, who is the present Custodian.

### Statement.

The suit was brought by the plaintiffs-appellants under Section 9 of the Trading with the Enemy Act (40 Stat. L. 419) to establish a debt owing to them by the defendant bank. The bill of complaint originally demanded judgment for the sum of \$391,028.29, with interest at 6 per cent. from the 6th day of April, 1917. By amendment, the amount of this demand was reduced to \$243,528.29, with interest at 5 per cent. from the 6th day of April, 1917. They recovered a judgment in the District Court for \$50,919.97, with interest thereon from August 12, 1919, amounting to \$14,766.80. Both parties appealed from this judgment. The Circuit Court of Appeals reversed the judgment of the District Court and directed the complaint to be dismissed on the merits.

### Facts.

The appellants were plaintiffs in the District Court and the appellee Wiener Bank-Verein was a defendant. For convenience, the appellants will be referred to in this brief as the plaintiffs and the appellee Wiener Bank-Verein will be referred to as defendant bank.

The proof before the District Court consisted partly of oral testimony and partly of stipulations of fact. The pleadings were amended to conform to the facts stipulated (R. 35, fol. 103; R. 48, fol. 143).

Plaintiffs were engaged in business in New York as bankers and brokers in the general business of brokerage and foreign exchange. They specialized largely in foreign exchange and foreign currencies (R. 95, fol. 284; R. 97, fol. 290).

Defendant bank is a banking corporation organized under the laws of the Austro-Hungarian Empire. After the dissolution of that Empire it continued its corporate existence by validation of its charter by the present Austrian Government. Its principal place of business is in Vienna, Austria. It has no branch office in the United States (R. 35, fol. 105; R. 36, fol. 106).

There is some evidence that prior to the outbreak of war between the United States and Austria, defendant bank had a "representative" in New York City who transacted some business with the plaintiffs on behalf of defendant bank (R. 103, fol. 307). There is no evidence of the extent of his agency. There is no evidence that his agency continued after the outbreak of the war. There is no evidence that he had any funds in his possession belonging to defendant bank. There is no evidence that he had authority to pay out such funds if he had them. And, finally, there is no evidence that the plaintiffs ever made a demand on him.

For a number of years preceding the outbreak of the war between the United States and Austria, plaintiffs had a bank account in kronen with defendant bank, in which plaintiffs, from time to time, made deposits in kronen for the purpose of providing for the payment of drafts and orders issued by them and drawn on and payable at defendant bank in Vienna (R. 36, fols. 106-107). The bal-

ance carried interest at the rate of  $2\frac{1}{2}$  per cent. per annum (R. 47, fol. 140).

Once every three months defendant bank rendered a statement of account to plaintiffs. This statement was in each case accompanied by a printed letter referring to the statement enclosed and requesting the recipient to "take notice of the general conditions contained within governing the relations with our Institution." The general conditions appended to the letter contained the following:

"3. Unless otherwise agreed upon we are entitled to cancel existing connections at any time and according to our free decision.

\* \* \* \* \*

11. The relations existing between us and our business friends will in general be governed by the laws in force in Austria. So far as transactions with our main office come into consideration the City of Vienna is to be considered the place where payment is to be made or where obligations are to be met, as the case may be" (R. 39, fol. 115; R. 40, fol. 119; R. 42, fol. 126).

All the transactions in this case were with the main office at Vienna.

War was declared by the United States on Austria on December 7, 1917. Before the war, plaintiffs issued against this account in due course many orders for the payment of various sums. These orders were paid by defendant bank upon presentation during the war and after, as they came in (R. 108, fol. 233; R. 109, fol. 326).

Commercial relations between the United States and Austria were resumed on July 14, 1919.

Immediately thereafter, plaintiffs resumed their relations with defendant bank making large deposits and withdrawals (R. 108, fol. 324; R. 109, fol. 327; R. 110, fol. 329; R. 111, fol. 331).

Up to this point there is no evidence of any kind that plaintiffs ever demanded payment of their pre-war balance from defendant bank.

On August 6, 1919, plaintiffs called defendant bank as follows:

"Referring to our old balance will you command to American Property Custodian paying out your former funds in his custody equivalent in dollars at March fifteen nineteen seventeen rate of eleven eighteen stop If you agree wire us to that effect and we will send you necessary papers to be filled out and signed by you stop This will oblige her debts which we otherwise be compelled to incure" (R. 109, fol. 227; R. 110, fol. 228).

The purport of this communication was not understood by defendant bank and the following cable was sent in reply on August 12, 1919:

"Your cable regarding our command to Custodian incomprehensible wire details and reasons and transactions concerned" (R. 110, fol. 328).

To this cable of inquiry defendant bank never made an answer (R. 110, fol. 229).

On August 15, 1919, the plaintiffs called to defendant bank as follows:

"Fifteen credit Credit Suisse Zurich Domition old Kronen against Domition new Kronen stop exchange our balance into new Kronen" (R. 109, fol. 226).

Defendant bank made the exchange requested (R. 109, fol. 227).

Thereafter, plaintiffs insisted upon re-establishing their pre-war balance and the defendant bank re-established it accordingly (R. 111, fol. 333).

Prior to April 1, 1920, the plaintiffs refused to accept payment of the kronen they had on deposit in the defendant bank as offered by the defendant bank either in kind or in United States currency at the rate of exchange then prevailing, but demanded the amount of said kronen as of April 6, 1917, at the average cable transfer rate of exchange between United States dollars and Austrian kronen prevailing in the United States during the month immediately preceding the outbreak of the war between the United States and Austria-Hungary, namely, 11.18 United States cents for each Austrian krona (R. 37, fol. 110; R. 66, fol. 138; R. 47, fol. 139).

During all the time when this bank account was maintained by the plaintiffs in the defendant bank, before, during, and after the war, there was in force in Austria a General Civil Law Code, which contained the following provision (Section 1425 enacted in the year 1812):

"If a debt cannot be paid because the creditor is unknown, absent or dissatisfied with the offer, or because of other important reasons, the debtor may deposit in court the subject matter in dispute; or if it is not susceptible of such action, he may take legal steps for its custody. If legally carried out and the creditor has been informed thereof, either of these measures discharges the debtor of his obligation and places the subject matter delivered at the risk of the creditor" (R. 36, fol. 108; R. 37, fol. 110).

A dispute having thus arisen between the plaintiffs and defendant bank as to the mode of settling this pre-war kronen account, the amount thereof was deposited by defendant bank on April 1, 1920, pursuant to the Austrian statute in question in the Circuit Court for the Interior at Vienna, which was the appropriate court for making



such deposits (R. 37, fol. 111; R. 38, fol. 112). The amount deposited included accrued interest to the date of deposit at  $2\frac{1}{2}$  per cent. per annum (R. 47, fols. 140, 141).

Due notice of such action was thereupon given by defendant bank to plaintiffs (R. 38, fol. 112; R. 111, fol. 333; R. 112, fol. 335).

On March 15, 1919, the plaintiffs filed a notice of claim against the defendant bank with the Alien Property Custodian, under Section 9 of the Trading with the Enemy Act (R. 49, fol. 165; R. 56, fol. 168). There appears to be no identity between the claim described in this notice and the claim involved in this suit. The notice claims

"moneys and securities due to claimant as follows:

Cash Balance Dollars.....50.92

Reisen.....2,251,927.33

Securities.....1,080,800.00

Interest accrued from 1/1/16 on cash balance at 4%."

The foregoing notice of claim was evidently abandoned. This suit is not based on it. The Circuit Court of Appeals in commenting on it (R. 139) says:

"On this point of demand the evidence compels us to disagree with the court below. Passing the point that no demand was pleaded other than that of December 15, 1921, on the Custodian, it is argued that plaintiffs did in legal effect make several earlier demands, viz.: in March, 1919, by filing documents with the custodian and in August, 1919, by an interchange of letters and telegrams with both banks (the reference here is to the defendant bank and to Deutsche Bank).

It would serve no useful purpose to recite the lengthy statutory demands of March, 1919; suffice it to say that we are convinced that all these documents related to the property of customers or clients of Zimmermann & Forshey which had either been im-

pounded by the German authorities or lost track of in the fog of silence which had enveloped the Austrian Bank. It is impossible to find in these documents any evidence of a demand for plaintiff's own deposit account.

We are confirmed in this result by observing that as to each bank account, as soon as commercial relations were re-established, plaintiff's expressed the desire to go on with pre-war business and maintain their old deposit accounts; and these desires were expressed after March, 1919."

On December 15, 1921, plaintiffs filed with the Alien Property Custodian another proof of claim under Section 9 of the Trading with the Enemy Act (R. 113, fol. 339; R. 121, fol. 363). The amount claimed was \$391,028.29 with interest at 6 per cent. from April 6, 1917. The notice states:

"This debt arises from a pre-war balance which claimant had with above mentioned enemy or ally of enemy and which said enemy or ally of enemy now owes this claimant, figured at the rate of exchange between March 6th and April 6, 1917, of 11.80 cents in U. S. Currency for each Austrian krone" (R. 121, fol. 361).

This suit is based on that notice of claim and the amount mentioned in this notice of claim is the same as the amount set out in the original bill of complaint.

As above stated, the complaint was subsequently amended by reducing the amount sued for from kronen 3,313,799.03, the number of kronen stated in the bill of complaint to be due and owing to the plaintiffs, to the sum of kronen 2,063,799.03, a reduction of kronen 1,250,000 (R. 19, fol. 55; R. 21, fol. 63). The reason for the amendment was that the plaintiffs wished to escape liability for some \$140,000, which was the dollar equivalent of kronen purchases in March, 1917, aggregating the said total of

1,250,000 kronen (R. 99, fols. 295-297; R. 100, fols. 298-299; R. 101, fol. 301).

The plaintiffs have assigned thirteen assignments of error. None of these assignments of error is directed to any alleged error made by the Circuit Court of Appeals in holding that the court deposit by the defendant bank under the Austrian law was a discharge of its debt or in holding that the provisions of Articles 248 and 249 of the Treaty of St. Germain-en-Laye (United States Treaty, Series No. 659) do not apply to this suit.

The defendant bank contends that:

(1) The Austrian law is the law by which the mutual rights and obligations of the plaintiffs and the defendant bank must be measured in this suit.

(2) The deposit made by the defendant bank on April 1, 1920, in the Circuit Court of Vienna under the Austrian law was a deposit of the entire amount of its debt to the plaintiffs, and discharged the defendant bank from further liability.

(3) The provisions of the Treaty of St. Germain-en-Laye, Articles 248 and 249, relating to the rate of exchange to be applied in settlement of prewar debts between Austrian and American nationals do not apply to this case, A—because the provisions in question do not apply to a suit under Section 9 of the Trading with the Enemy Act to establish a kronen debt owing from an Austrian bank, payable in kronen on demand in Austria, and B—because the deposit referred to in the defendant bank's second contention was made prior to the time when the treaty came into force.

(4) If the court deposit made by defendant bank on April 1, 1920, should be found ineffective as a

discharge, the plaintiffs are entitled to recover their prewar kronen balance, without interest until April 1, 1920, but with  $2\frac{1}{2}$  per cent. interest thereafter, at the judgment day rate only, because, A—This case is governed by the rule in *Humphrey's* case; B—No account was stated; C—The debt, being a bank balance, could be matured only by a demand, and a demand has not been made; and D—The outbreak of the war did not mature the debt.

(5) The equities are not fairly stated in Point VI of the plaintiffs' brief.

We subjoin here a chronological summary of events referred to in this, as well as in the plaintiffs' brief for convenient reference:

- Apr. 6, 1917—War declared between the United States and Germany;
- Oct. 6, 1917—Trading with the Enemy Act approved;
- Dec. 7, 1917—The United States declares war on Austria;
- Nov. 3, 1918—Armistice signed between the American and the Austrian forces;
- Nov. 11, 1918—Armistice signed between American and German forces;
- July 14, 1919—General trade and commercial communication restored between the United States and Austria;
- Sept. 10, 1919—The Treaty of St. Germain-en-Laye signed by the plenipotentiaries of the various signatory powers;
- Apr. 1, 1920—Defendant bank deposited plaintiffs' kronen balance pursuant to Section 1425 of the General Civil Law Code of Austria;

- July 16, 1920—The treaty came into force pursuant to Article 381 thereof, except as to the United States of America;
- July 2, 1921—Congress passed the joint resolution terminating the state of war between the United States and Austria;
- Aug. 24, 1921—The treaty of peace between the United States and Austria, known as the "Treaty of Vienna," signed;
- Nov. 8, 1921—The Treaty of Vienna ratified;
- Nov. 26, 1924—Agreement made between the United States and Austria establishing the Tripartite Claims Commission for the determination of claims between American nationals and Austrian and Hungarian nations;
- Dec. 12, 1925—The agreement for the Tripartite Claims Commission ratified at Washington, D. C.

### POINT I.

**Austrian law is the law by which the mutual rights and obligations of the plaintiffs and the defendant bank must be measured in this suit.**

The defendant bank was a foreign corporation doing business in Vienna, Austria, under a charter granted to it by the old Austro-Hungarian Government, and validated by its successor, the present Austrian Republic (R. 35, fol. 105). The defendant bank had no branch office in the United States (R. 36, fol. 106).

There is no evidence showing where the original agreement between the parties was made. But the evidence shows unquestionably where the agreement was to be per-

formed. The stipulation of fact made between the parties is as follows (R. 36, fol. 106) :

“For a number of years preceding the outbreak of the war between the United States and Austria, plaintiffs maintained a bank account in kronen with the defendant, the Wiener Bank Verein, in which the plaintiffs, from time to time, made deposits in kronen for the purpose of providing payment of drafts and orders issued and transmitted by the plaintiffs by letter, cable, wireless or otherwise, and drawn on and payable at the defendant bank, Wiener Bank Verein, at Vienna.”

The Supreme Court of the United States, in the case of *Humphrey v. Deutsche Bank* (No. 224, October Term, 1926, decided November 23, 1926), considered a relation identical with the relation between the plaintiffs and defendant bank as disclosed in the stipulation quoted.

Humphrey was an American citizen and a resident of the State of California. Prior to 1915 he had established a number of deposits with a branch of the Deutsche Bank located at Nurnberg, Germany. In June, 1915, Humphrey called at the Deutsche Bank's office and banking house at Nurnberg and demanded his money. Owing to war regulations the bank declined to comply with the demand. Humphrey began suit in July, 1921, under the Trading with the Enemy Act. The courts below held that his German mark deposit should be translated into dollars at the rate of exchange existing when the demand was made. The Supreme Court reversed the courts below, saying:

“In this case, unlike *Hicks v. Guinness*, 296 U. S. 71, at the date of the demand the German bank owed no duty to the plaintiff under our Law. It was not subject to our jurisdiction and the only liability that it incurred by its failure to pay was that which the German Law might impose. It has

incurred no additional or other one since. The suit in this country is based upon an obligation existing under the foreign law at the time when the suit is brought and the obligation is not enlarged by the fact that the creditor happens to be able to catch his debtor here. *Davis v. Mills*, 194 U. S. 451. See *Western Union Telegraph Co. v. Brown*, 234 U. S. 542."

Apparently, the court was of the opinion that, aside from any express agreement between the parties (none was proved at the trial), the nature of the transaction determined its status as a German debt governed by German Law.

The rule laid down in the *Humphrey* case is the latest authoritative expression of a doctrine supported by a formidable array of judicial authority and by our most distinguished text writers.

*Andrews v. Pond*, 13 Peters 65.

*Hall v. Cordell*, 142 U. S. 116.

*Pritchard v. Norton*, 106 U. S. 124.

*Union National v. Chapman*, 169 U. S. 538.

*London Assurance v. Companhia de Moagens*, 167 U. S. 149.

*Canada Southern Railroad Co. v. Gebhardt*, 109 U. S. 527.

*Relfe v. Rundle*, 103 U. S. 222.

*Stockwell v. Supreme Court, Independent Order of Foresters*, 216 Fed. 205.

*Dickinson v. Edwards*, 77 N. Y. 573.

*Old Dominion Copper etc. v. Bigelow*, 203 Mass. 159.

*Benedict v. Dakin*, 243 Ill. 384.

*Douglas v. Paine*, 141 Mich. 485.

*Chatenay v. Brazilian etc.* (1891), 1 Q. B. 79.

*Story, Conflict of Laws* (8th Ed.), Sec. 280, p. 376.

*Beach on Contracts*, Secs. 592, 606.

*Dicey, Conflict of Laws* (3rd Ed.), 609, 610.

13 *Corpus Juris*, 249.

Plaintiffs' counsel, however, argue strenuously that the contract in the instant case is not governed by Austrian law. Under the circumstances, although it may be superfluous, it will do no harm, we think, to document the holding of the *Humphrey* case by the authorities cited in the discussion which follows.

The general rule as to the law of the contract is stated in 13 *Corpus Juris* 249, as follows:

"When the contract is made in one country and is to be performed either wholly or partly in another, the proper law of the contract especially as to the mode of performance may be presumed to be the law of the country where performance is to take place, the *lex loci solutionis*."

In the case of *Benedict v. Dakin*, *supra*, the court, at page 387, says:

"The general rule is that the place where a contract is made must govern the performance of its terms and conditions; but when it is the express intention of the parties that the contract is to be performed at a different place and under a different jurisdiction from the place where it is made, then the law of the place of performance must govern."

In the case of *Old Dominion Copper Co. etc. v. Bigelow*, *supra*, the court stated the rule as follows:

"Where a contract is made with a purpose by the parties to it that it shall be performed in a particular place, its validity and interpretation are to be determined by the law of the place where it is to be performed. It is made with a view to that law,"



citing among many other cases, the *Pritchard v. Norton* and the *Hall v. Cordell* cases in the Supreme Court of the United States.

In the English case of *Chatenay v. Brazilian, etc., supra*, the court held :

"The business sense of all business men has come to this conclusion, that if a contract is made in one country to be carried out between the parties in another country, either in whole or in part, unless there appears something to the contrary, it is to be concluded that the parties must have intended that it should be carried out according to the law of that other country. Therefore the law has said that if the contract is to be carried out in whole in another country, it is to be carried out according to the law of that country \* \* \*."

In the case of *Dickinson v. Edwards*, 77 N. Y. 573, the rule is stated as follows (bottom of p. 576) :

"This Court conceded that the law is that a contract is to be governed by the law of the place where it is made, if it is not by its terms to be performed elsewhere; *but held that if by its terms it is to be performed in a State other than that in which it was made the law of the State in which it is by its terms to be performed, must govern.*" (Italics ours.)

In the case of *Douglas v. Paine*, 141 Mich. 485, the court stated the rule by quoting with approval *Beach on Contracts*, Sections 592 and 606, as follows :

"If by the terms or nature of the contract, it appears that it was to be executed in another country, then the place of making the contract becomes immaterial and the law of the place where the contract is to be performed governs in determining the rights of the parties. If a contract is made in one State or country and it is to be performed in another, it

will be presumed that it was entered into with reference to the laws of the latter and those laws will be resorted to in ascertaining the validity of the contract."

This law governs not only as to the execution, authentication and construction of a contract, but also as to the legal obligations arising from it and as to what is to be deemed a performance, satisfaction or discharge.

Judge Story, in his *Conflict of Laws*, Section 280, page 376, 8th Edition, says:

"The rules already considered suppose that the performance of the contract is to be in the place where it is made, either expressly or by tacit implication. But where the contract is, either expressly or tacitly, to be performed in any other place, there the general rule is in conformity to the presumed intention of the parties that the contract, as to its *validity, nature, obligation, and interpretation* is to be governed by the law of the place of performance. This would seem to be a result of natural justice" (citing *Andrews v. Pond*, 13 Peters 65).

Chief Justice Taney, who wrote the opinion in the *Andrews* case, says on page 77:

"The general principle in relation to contracts made in one place to be executed in another, is well settled. They are to be governed by the law of the place of performance—and if the interest allowed by the laws of the place of performance is higher than that permitted at the place of contract, the parties may stipulate for the higher interest without incurring the penalties of usury."

In the case of *London Assurance v. Companhia de Moagens*, 167 U. S. 149, Peckham, J., at page 160 says:

"Generally speaking, the law of the place where the contract is to be performed is the law which governs as to its validity and interpretation."

Mr. Dicey, in his book, *Conflict of Laws*, 3rd Edition (1922), 609, 610, says:

"When the contract is made in one country, and is to be performed either wholly or partly in another, then the proper law of the contract, *especially as to the mode of performance*, may be presumed to be the law of the country where the performance is to take place." (Italics ours.)

This contention is given especial force in this case by the manner in which the plaintiffs and the defendant bank interpreted the contract. It is admitted by the stipulation that (R. 36, fol. 107):

"During the period that the plaintiffs maintained the bank account with the defendant, the Wiener Bank Verein, the latter sent to the plaintiffs and the plaintiffs received periodic and regular statements of account at least once in three months, such statements of account being rendered on a printed sheet identical with the facsimile annexed to this stipulation and marked Exhibit A, with the exception of the blanks shown on the said facsimile, which blanks were filled out in each statement of account in accordance with the facts shown on such statement."

On the first page of those printed provisions, immediately preceding the signature of the defendant bank, appears this statement:

"At the same time we beg to request you to take notice of the general conditions and terms for deposits and account current which appear within."

Among the conditions referred to in this last quotation is the following:

*"The relations existing between us and our business friends will in general be governed by the laws in force in Austria. So far as transactions with our main office come into consideration, the City of Vienna is to be considered the place where payment is to be made or where obligations are to be met, as the case may be. In transactions existing between customers and our branches, the City where the branch is domiciled becomes the place of payment or the place of fulfillment of liabilities as the case may be."* (Italics ours.)

There is no evidence that that condition as set forth in paragraph II was not entirely in harmony with the original agreement between the parties. The fact that at least once in three months a statement of account was rendered in which the plaintiffs' attention was called to that condition and that the plaintiffs at no time took exception to it, should conclude the plaintiffs and estop them from denying that they dealt with the defendant bank subject to that condition.

Furthermore, the defendant was a foreign corporation. The stipulation is to the effect that:

*"The defendant, Wiener Bank Verein, is a foreign corporation engaged in the business of banking. It was organized under the laws of the Empire of Austria-Hungary, and received its corporate charter from the duly constituted Governmental Department under that Empire empowered to issue the same. It has continued its corporate existence unchanged during the changes in the Government of Austria occurring during and after the war and its charter has been continued and validated by the present Austrian Government. Its principal place of business is in Vienna, Austria. It has no branch office in the United States of America."*

one who contracts or deals with a foreign corporation presumably accepts that the contract and the dealings should be subject to the laws of the domicile of the foreign corporation.

The leading case in the Federal jurisdiction on this point is the case of *Canada Southern Railway Co. v. Ashcroft*, 109 U. S. 327. A condensed statement of the facts in that case may not be out of place here.

The *Canada Southern Railway Company*, a corporation organized under the laws of the Government of the Province of Canada, floated a bond issue for some \$5,000,000 secured by a trust mortgage on its property. It was unable to meet the interest charges. An additional bond issue for some \$2,000,000 was floated, also secured by a trust mortgage. But its continuance was not achieved. A new bond issue of \$3,000,000 was floated at a lower rate of interest than the preceding issue and an offer made to the earlier bondholders to exchange their holdings, dollar for dollar, for the new bonds. Under this plan the original trust mortgages were to be discharged and the last bond issue secured by a first trust mortgage on the railroad's property.

Over two-thirds of the bondholders consented to the exchange. The rest refused.

The railroad applied to the Canadian Parliament for a special act to approve the new bond issue, discharge the earlier mortgages and substitute the last bond mortgage, declaring it to be a first mortgage on the railroad's property.

Under the laws of the Dominion of Canada it was competent for the Parliament to pass such an act. The act was passed. It provided, among other things, that all of the earlier bondholders shall be "deemed" to have consented to the exchange of their bonds as per for the new bonds as per, although the new bonds created a lower rate

of interest and the new mortgage secured almost twice the amount of the original mortgage, thus diminishing the security for the bond issue practically by half.

A group of New York bondholders began a suit against the railroad. They were represented by the late Mr. Joseph H. Choate. The case reached the Supreme Court of the United States, which, in its opinion sustaining the railroad, said as follows (p. 537):

"Every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government \* \* \* as the known and established policy of that government authorizes. To all intents and purposes, he submits his contract with the corporation to such a policy of a foreign government, *and whatever is done by that government in furtherance of that policy which binds those in like situation with himself who are subjects of the government, in respect to the operation and effect of their contracts with the corporation, will necessarily bind him.* He is conclusively presumed to have contracted with a view to such laws of that government, because the corporation must of necessity be controlled by them and it has no power to contract with a view to any other law with which they are not in entire harmony." (Italics ours.)

In the case of *Stockwell v. Supreme Court, etc.*, 216 Fed. 205, a Canadian fraternal society entered into a contract in New York with a member. The certificate of membership which constituted the contract between the society and the member stipulated that the monthly payments would not be increased while he remained in good standing.

Thereafter, when it appeared that a shortage of funds applicable to the payment of claims of members of a certain "time class" known as "the pre-ninety-nines" was

imminent, an amendment of the society's charter was secured by an act of the Dominion Parliament, as a result of which an assessment of \$240 per \$1,000 was levied on the certificate held by the member, and was declared to be a lien thereon.

In an action by the beneficiary of the member, the Court held, after a very exhaustive and careful opinion, that the contract was subject to the laws of Canada and allowed the lien.

The plaintiffs' counsel assert that, even if the parties had contracted to be governed by Austrian law, the outbreak of the war dissolved the contract, thereby discharging the rights of the parties from the application of the Austrian law. The statement is pure dogma. No attempt is made to support it, either by argument or by authority. But, assuming, though not granting, that the contract between the plaintiffs and the defendant bank was dissolved or terminated by the war, by what mystic legal alchemy was a duty to pay kronen in Vienna transmuted into a duty to pay dollars in New York? Let us grant for the moment that the plaintiffs contemplated that they will be able effectively to dispose of their kronen in Vienna in accordance with their original intention. What if they did? They nonetheless remained bound by the principle stated in the *Canada Southern Railroad* case, that:

"Every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government \* \* \* as the known and established policy of that government authorizes."

## POINT II.

The deposit made by the defendant bank on April 1, 1920, was a deposit of the entire amount of its debt to the plaintiffs, and discharged the defendant bank from further liability.

By contract between the parties, their relations were to be governed by Austrian law (R. 42, fol. 126).

If there had been no express agreement, the Austrian law would govern by virtue of principles of law long established here, as already shown.

Defendant bank was an Austrian banking corporation located in Vienna. Of necessity, it existed and did business in accordance with Austrian laws. It could not do otherwise.

Its contract with the plaintiffs was a very simple one—the ordinary contract between bank and depositor. Its only obligation was to hold plaintiffs' funds when deposited and pay them out when demanded, allowing interest in the meantime at  $2\frac{1}{2}$  per cent. Vienna was the place of payment (R. 43, fol. 127). The currency deposited was Austrian kronen. The only place of performance was Austria. That, inferentially, is also the place where the contract was made. There is no evidence that it was made anywhere else.

The plaintiffs opened their account with defendant bank a number of years before the war (R. 36, fol. 106). During the period of the account and for a long time before there was in force in Austria Section 1425 of the General Civil Law Code of that country. It provided as follows (R. 36, fol. 108; R. 37, fol. 109):

“If a debt cannot be paid because the creditor is unknown, absent or dissatisfied with the offer, or because of other important reasons, the debtor



may deposit in court the subject matter in dispute; or, if it is not susceptible of such action, he may take legal steps for its custody. If legally carried out and the creditor has been informed thereof, either of these measures discharges the debtor of his obligation and places the subject matter delivered at the risk of the creditor."

The statute quoted is not against our public policy; it is not opposed to any American statute; it is not a war measure; it is not discriminatory, since it applies to Austrians and Americans alike; it is reasonable; and, finally, it has its analogue in every civilized jurisdiction, including our own. For it is nothing more than a law permitting a debtor to make a tender of his debt.

Communication and commercial relations between the United States and Austria were restored on July 14, 1919.

After that date the defendant bank offered to pay the plaintiffs the amount of kronen on deposit, either in kind or in United States dollars, at the then existing rate of exchange (R. 37, fol. 110). A bank has always the legal right to wind up or discontinue a depositor's account. In this case the defendant bank had that right also by contract (R. 40, fol. 119).

The plaintiffs refused the offer and demanded payment in United States dollars at the pre-war rate of exchange (R. 37, fols. 110, 111). The rate of exchange between kronen and dollars had greatly depreciated.

It will thus be seen that at least two of the reasons specified in the statute for making the deposit in court were present, namely, the creditor was absent and was dissatisfied with the offer.

Thereupon, on April 1, 1920, defendant bank deposited the entire amount of plaintiffs' balance, with accrued interest at  $2\frac{1}{2}$  per cent. per annum (the rate agreed upon), in the Circuit Court for the Interior at Vienna, in ac-

cordance with the Austrian statute above quoted (R. 37, fols. 111, 112; R. 47, fol. 141), and gave due notice thereof to plaintiffs by cable and mail (R. 111, fols. 332, 333).

The Circuit Court of the Interior at Vienna was the proper court in which to make such deposits (R. 38, fol. 112).

This court deposit, it is submitted, constituted a complete discharge of the defendant bank's liability on the debt in question.

*Ford v. Surget*, 97 U. S. 594.

*In re Ling & Duhr* (1918), 2 Chancery 298.

In the case of *Ford v. Surget* the plaintiff sought to recover from the defendant the value of 200 bales of cotton, amounting to \$120,000, which the defendant had destroyed. The defendant admitted the act, but asserted in defense that it was done in accordance with the rules of the Confederate authorities, which at the time were in occupation of the plantation in Mississippi, where the cotton was stored. The court held that since the Civil War, under the Supreme Court's previous rulings, was a war between nations, the general rules of war between belligerents would apply, so that the defendant having burned the cotton in conformity with the law of the *de facto* government of the territory was not liable.

In the case of *Ling & Duhr* the facts were these:

The funds of Ling & Duhr, enemies, had been sequestered by the British Custodian. A creditor filed a claim against that fund, claiming the amount to be due for goods sold and delivered prior to the war. The claim had been allowed by the Registrar, to whom, under the English practice, it first had to be submitted, and the Custodian brought suit to vary the Registrar's ruling in allowing the claim.

The sum for which the suit was brought was payable in marks at a bank in Crefeld, Germany. In disallowing the claim, Younger, J., after conjecturing that the debt may have been paid into the Reichsbank or some custodian under emergency legislation, continued:

"Although it is no part of my present duty to state what, for all purposes, would be the effect of such payment, it is sufficient to say that the payments made in Germany by the enemy in question to the Reichsbank or to such other Custodian or authority as may be prescribed by German law to receive them, would be sufficient to justify the Court under this jurisdiction in refusing to direct payment out of the funds in the hands of the Custodian to a creditor whose claim had been so satisfied, *and particularly in a case like the present where the contract in respect of which the creditor claims was one made in Germany to be performed in Germany and altogether subject in its incidents and rights to German law.*" (Italics ours.)

It will be noted that in the two cases just cited the statutes relied on by the defendants were in the nature of emergency war legislation. *A fortiori* the rule would apply to the case at bar, where the statute relied on has been a law of the land for many years, applying to natives and foreigners alike, and was in no sense emergency war legislation.

The defendant bank was entitled to avail itself during the war of the provisions of law in force in Austria. The United States Supreme Court so held in the case of *Masterson v. Howard*, 85 U. S. 99, where it said:

"The existence of war does indeed close the courts of each belligerent to the citizens of the other, *but it does not prevent the citizens of one belligerent from taking proceedings for the protection of their own property, in their own courts, against the citizens of the other.*" (Italics ours.)

To the same effect, see *Dorsey v. Kyle*, 96 American Decisions 621 (30 Md. 512).

The plaintiffs say (p. 95 of their brief) :

"Even if the Austrian law pleaded by the defendant bank, might be considered in ordinary circumstances to discharge that bank of any liability beyond the subject matter of the deposit, we insist that it cannot have such an effect here, because to do so would clearly render nugatory the provisions of the Treaty of Peace between the United States and Austria, known as the Treaty of Vienna, which became the law of Austria, as well as of the United States, and superseded any National law inconsistent therewith."

They cite, in support of this statement, the case of *Ware v. Hylton*, 3 Dall. 199.

During the Revolutionary War, debts owing to British creditors had been paid by the American debtors into loan offices, "in paper money, of very little value, either under laws confiscating debts, or under laws authorizing payment of such debts in paper money and discharging the debtors" (*Ware v. Hylton*, 3 Dall. 199, at p. 238).

The Statute of Virginia, passed on October 20, 1777, was one of such laws. The court, in a very elaborate opinion written by Mr. Justice Chase, held that deposits made under that statute of Virginia did not discharge the debts.

An examination of the opinion of Mr. Justice Chase discloses that his ruling was based upon the specific point that *under the terms of the Jay Treaty*, by which the Revolutionary War was terminated (United States and Great Britain, September 3, 1783, 18 Stat. L., Part 2, p. 269), *the courts of the United States and of the several states had no power to hear defenses based on emergency statutes such as the Virginia statute.*

The Jay Treaty contained a specific provision to that effect.

The fourth article of the Treaty provided :

"It is agreed that creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money of all bona fide debts heretofore contracted."

Mr. Justice Chase held that "lawful impediments" meant impediments which *could be interposed in a court of law*, and that the *only impediments which could be interposed in a court of law were defenses*; that it was competent for the United States and England to agree that creditors on either side shall meet with no such "lawful impediments." He did not hold that a treaty has retroactive force or that it can operate on something which was not in existence when the treaty came into power.

The provisions of the fourth article of the Jay Treaty might be likened to statutes under which certain kinds of evidence or evidence of certain facts is made incompetent. Thus, oral evidence of a contract for the sale of land is incompetent by statute; so is testimony in an action by or against an executor as to transactions between the deceased and a witness interested in the event. The fourth article was held by Mr. Justice Chase merely to render incompetent any proof of the emergency statute upon which the defendants relied and which in the absence of the treaty would have constituted a good defense. He says at page 244 :

"I consider the fourth article in this light; that it is an express agreement that certain things shall not be permitted in the American Courts of Justice and that it is a contract on behalf of those courts that they will not allow such facts to be pleaded in bar to prevent a recovery of certain debts."

We submit that the learned counsel for the plaintiffs failed to quote the most apposite portions of Mr. Justice Chase's long and scholarly opinion. If Mr. Justice Chase is an authority at all, the deposit made by the defendant bank was a complete discharge of the debt, unless prevented by some provision in the Treaty of Vienna, for he says at page 234 :

*"But the debt was extinguished as between the creditor and the debtor. The debt was legally paid and of consequence extinguished. The State interfered and received the debt and discharged the debtor from his creditor. If Virginia had confiscated British debts and received the debt in question and said nothing more, the debtor would have been discharged by operation of law. In the present case there is an express discharge on payment, certificate and receipt."* (Italics ours.)

And again (at p. 240) :

*"If the recovery of the present debt is not within the clear and manifest intention and letter of the fourth article of the Treaty and if it was not intended by it to annul the law of Virginia mentioned in the plea and to destroy the payment under it and to revive the right of the creditor against his original debtor \* \* \* I think the court ought to determine in favor of the defendants in error."* (Italics ours.)

Mr. Justice Chase went much further than the defendant bank asks this Court to go. The legislation involved there was a statute passed *subsequent to the accrual of the debt*, and was in its nature confiscatory. Furthermore, the statute was directed only against British subjects.

*The statute relied on by the defendant bank is a statute which was in force for a hundred years before the contract was made; is not confiscatory; is general in its terms, and applies to an Austrian as well as to an American creditor.*

The Treaty of St. Germain, as well as the Treaty of Vienna, will be searched in vain for any provision resembling, even remotely, the fourth article of the Jay Treaty; so that under the rule as laid down in *Haver v. Yaker*, 76 U. S. 32, these treaties do not apply.

As to the case of *Wolff v. Oxholm*, 6 M. & S. 92, cited on page 97 of plaintiffs' brief, it is sufficient to observe, first that the case involves a confiscatory statute and is therefore not in point, and second, that our own Courts have held directly to the contrary in the cases of *Ware v. Hylton* (*supra*) and in the case of *Ford v. Surget*, 97 U. S. 594, cited above.

On page 94 of their brief, the plaintiffs' counsel argue:

"In providing through the Trading with the Enemy Act for the taking over of property of 'enemies' and 'allies of enemy,' and, as a practical matter, thus depriving American citizens of their franchise through attachment or satisfaction of judgment, Congress within its power and authority as defined by the Constitution, provided for the recovery by American citizens, from property seized by the Alien Property Custodian, of claims which such citizens might have against 'enemy' and 'ally of enemy' subjects."

With reservations as regards the connotation of the word "claims," this may be granted.

But we cannot grant the contention which is repeated at the bottom of the same page, "That the kronen here owed are payable at a pre-war rate of exchange under the Trading with the Enemy Act whether or not they were due." This Court has already held to the contrary in the *Humphrey* case (*Die Deutsche Bank Filiale Nurnberg v. Humphrey*, No. 224 Oct. Term, 1926), where it said of

a bank deposit in marks in a German bank payable on demand in Germany:

"On the contrary, we repeat, it was and continued to be a liability in marks alone and was open to satisfaction by the payment of that number of marks, at any time, with whatever interest might have accrued, however much the mark might have fallen in value as compared with other things \* \* \*. An obligation in terms of the currency of a country takes the risk of currency fluctuations and whether creditor or debtor profits by the change, the law takes no account of it."

*The Humphrey case, it should be remembered, was a suit under Section 9 of the Trading with the Enemy Act to establish a foreign bank debt—precisely the case here.*

In conclusion, we wish to remark once more that in their petition for appeal to this Court (R. 132, 133) supported by their assignments of error (R. 134, 135) the plaintiffs do not complain of, or assign any alleged error committed by the Circuit Court of Appeals in holding that the Court deposit made by the defendant bank on April 1, 1920, constituted a discharge of its debt; and that the plaintiffs are therefore not entitled to a review by this Court of the alleged error.



### POINT III.

The provisions of Articles 248 and 249 of the Treaty of St. Germain-en-Laye (United States Treaties and Conventions, Vol. 3, p. 3149) relating to the rate of exchange to be applied in settlements of pre-war debts between Austrian and American nationals do not apply to this case, A—because the provisions in question do not apply to a suit under Section 9 of the Trading with the Enemy Act, to establish a kronen debt owing from an Austrian bank, payable in kronen, on demand, in Austria, and B—because the defendant bank made its court deposit under Austrian law before the Treaty came into force.

#### A.

The conversion of the currency of one country into the currency of another, at the pre-war cable transfer rate of exchange, under the provisions of Articles 296 and 297 of the Treaty of Versailles, and Articles 248 and 249 of the Treaty of St. Germain-en-Laye, has been described by French and German writers on the subject and by many of the mixed arbitral tribunals as "valorization." That noun and the verb derived from it, "to valorize," will be used in this discussion in order to avoid awkward locutions.

For a proper understanding of the subject, it is necessary to examine with care the provisions of Articles 248 and 249 of the Treaty of St. Germain-en-Laye, together with their respective Annexes, and to note the relative positions occupied by the respective Articles in the complete structure of the plan devised by the Treaty for the settlement of pre-war debts and claims for damages between the Governments signatory to the Treaty. The complete

text of Article 248, with its Annex of twenty-five paragraphs, and Article 249, with its Annex of fifteen paragraphs, is set out in full at the end of this brief.

A digest of the Articles in question and of the important passages in their respective Annexes follows:

#### ARTICLE 248 (SECTION III).

The Article is entitled "DEBTS" and provides that

"there shall be settled through the intervention of Clearing Offices to be established by each of the High Contracting Parties, \* \* \* *the following classes of pecuniary obligations.*"

1. Debts payable before the war.
2. Debts which became payable during the war arising out of transactions or contracts between opposing nationals where the total or partial execution thereof was suspended by the war.
3. Interest which had become due before the war as well as interest which became due during the war, provided it was not suspended by the war.
4. Capital sums which became payable before or during the war on government securities, provided payment was not suspended during the war.

The last sentence of this paragraph provides that

"The proceeds of liquidation of enemy property, rights, and interests mentioned in Section IV (Article 249) and in the Annex thereto will be accounted for through the Clearing Offices, in the currency and at the rate of exchange hereinafter provided in paragraph (d), and disposed of by them under the conditions provided by the said Section and Annex."

This enumeration (in which the numbering of the subparagraphs of the Article is retained) comprises the vari-

ons categories of *debts* with which alone this Article is concerned.

The rest of the Article and its Annex is devoted to a description of the mechanism of the Clearing Offices (see page 95 of this brief).

Certain aspects of that mechanism are of great importance.

We quote:

(a) "Each of the High Contracting Parties shall prohibit as from the coming into force of the present Treaty, both the payment and the acceptance of payment of such debts and also all communications between the interested parties with regard to the settlement of the said debts otherwise than through the clearing office."

Paragraph 3 of the Annex: "The High Contracting Parties will subject contraventions of paragraph (a) of Article 248 to the same penalties as are at present provided by their legislation for trading with the enemy. They will similarly prohibit within their territory all legal process relating to payment of enemy debts, except in accordance with the provisions of this Annex."

(d) "Debts shall be paid or credited in the currency of such one of the Allied and Associated Powers, their colonies or protectorates or the British Dominions or India, as may be concerned. If the debts are payable in some other currency, they shall be paid or credited in the currency of the country concerned, whether an Allied or Associated Power, colony, protectorate, British Dominion or India, at the pre-war rate of exchange.

*For the purpose of this provision* the pre-war rate of exchange shall be defined as the average cable transfer rate prevailing in the Allied or Associated country concerned during the month immediately preceding the outbreak of war between the said

country concerned and Austria-Hungary. (Italics ours.)

If a contract provides for a fixed rate of exchange concerning the conversion of the currency in which the debt is stated into the currency of the Allied or Associated country concerned, then the above provisions concerning the rate of exchange shall not be applied."

(The last sentence of this sub-paragraph refers to new States and, being of no importance in this discussion, is omitted.)

Subdivision (e): "The provisions of this Article and of the Annex hereto shall not apply as between Austria on the one hand and any one of the Allied and Associated Powers, their colonies or protectorates, or any one of the British Dominions or India on the other hand, unless within a period of one month from the deposit of the ratification on behalf of such Dominion or of India, notice to that effect is given to Austria by the Government of such Allied or Associated Power or of such Dominions or of India, as the case may be."

We wish to call special attention to 248 (a) and to Annex 3. Obviously, the framers of the Treaty thought it important to make the Clearing Office the sole and exclusive channel through which settlement funds should be permitted to flow.

We may now summarize and restate the provisions of Article 248 and its Annex as follows:

The United States may at its option (to be expressed by a notice to Austria to that effect given within thirty days) adopt the mechanism of the Clearing Offices for the adjustment of reciprocal claims between its nationals and the nationals of Austria, *consisting of debts, interest and capital sums*. If the option is exercised by the United States, and the "pecuniary obligations" between the two

countries and their respective nationals come to be settled through the intervention of Clearing Offices to be established by the High Contracting Parties, valorization shall apply, not otherwise. Note the wording of the second sentence of paragraph 248 (d) :

*"For the purpose of this provision the pre-war rate of exchange shall be defined as the average cable transfer rate prevailing, etc."*

To prevent interference with the orderly discharge of the functions of the Clearing Offices,

*"each of the High Contracting Parties shall prohibit \* \* \* both the payment and the acceptance of payment of such debts \* \* \* otherwise than through the Clearing Offices."*

Severe punishment shall be visited on persons attempting to settle their debts privately.

It is clear that if the United States had exercised its option and adopted Section III, Article 248, the plaintiffs could not maintain this suit at all. Possibly bringing the suit would have been a felony (par. 3 of the Annex to Art. 248; Sec. 16 of the Trading with the Enemy Act).

It is well known, however, that the United States did not adopt Section III (because it did not wish to become primarily liable for claims of Austrians against Americans—see note \*) so that at least so far as this Section is

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\* Note:—Mr. Baruch, in his book, "The Making of the Reparations and Economic Sections of the Treaties," at page 102, tells us that it was at the instance of the United States that clause 248(e) (the thirty-day notice clause) was inserted in order to permit the United States to remain out of the Clearing Office system which its representatives did not favor:

*"The Clearing House plan may be desirable and necessary for some of the Allied countries, but it was considered by the American representatives at Paris, that it might be undesirable, if not impossible, for the United States. For that reason they took steps to have the adoption of the scheme made optional."*

concerned, there are no valorization provisions which the plaintiffs can invoke here.

#### ARTICLE 249 (SECTION IV).

This Article is entitled "Property, rights and interests." It directs that

"The question of private property rights and interests in an enemy country shall be settled according to the principles laid down in this Section (Section IV) and to the provisions of the Annex hereto,"

and provides that

(a) All exceptional war measures and measures of transfer taken by Austria, if liquidation thereunder has not been completed, shall be immediately discontinued.

(b) The right is reserved to the United States to retain and liquidate all enemy property in its control. This liquidation is to be carried out according to the laws of the United States, and the owner shall have no right to dispose of the property under liquidation without the consent of the United States.

(c) Enemies whose property shall have been liquidated by the United States shall be entitled to its value fixed by methods prescribed by the laws of the United States.

(d) Except as to reservations laid down in the Treaty, all vesting measures taken or to be taken by either of the High Contracting Parties, in pursuance of exceptional war measures or measures of transfer, are confirmed.

(e) United States nationals shall be entitled to compensation in respect of damage or injury inflicted upon their property, rights and interests through the application of exceptional war measures or measures of transfer by Austria. This compensation shall be borne by Austria and may be charged upon property of Austrian nationals

under the control of the United States. The property *may* be constituted as a pledge for enemy liabilities under paragraph 4 of the annex (see *infra*).

(f) Where restitution in specie is possible, it shall be made *by Austria*. Where it is impossible, private agreements may be made *by the intermediation of the Powers or Clearing Offices*, to the end that the United States nationals may receive satisfactory equivalents for the property of which he was deprived.

(g) The rights under (f) are reserved to nationals of those Allied and Associated Powers who did not apply measures of transfer before the Armistice.

(h) Except in cases where restitution in specie has been made by Austria, the net proceeds of the sale of enemy property and in general all cash assets of enemies, shall be dealt with as follows:

Subparagraph 1. As regards Powers adopting Section III (this of course excludes the United States), the proceeds shall be credited through the Clearing Office to the power of which the owner is a national, any credit balance in favor of Austria to be dealt with in accordance with the Reparations provisions of the Treaty (Art. 189, Part VIII).

Subparagraph 2. As regards the United States, such proceeds and cash assets held by Austria shall be paid immediately to the owner or to his Government. But proceeds of liquidation and cash assets held by the United States shall be subject to disposal in accordance with the laws of the United States and *may* be applied in payment of the claims and debts defined in paragraph 4 of the Annex (see *infra*). Any balance remaining shall be dealt with in accordance with the Reparations provisions.

(i) (This refers to liquidation effected in new States and is of no importance here.)

(j) Austria agrees to compensate its own nationals for their property applied by the United States, pursuant to the foregoing provisions.

(k) All capital taxes levied by Austria on property of United States nationals after November 3, 1918 (the date of the Armistice), shall be restored to the owners.

Paragraph 4 of the Annex, which is referred to in subparagraph (h)2 of the Article, reads as follows:

"All property, rights and interests of nationals of the former Austrian Empire within the territory of any Allied or Associated Power and the net proceeds of their sale, liquidation or other dealing therewith, may be charged by that Allied or Associated Power in the first place, with payment of amounts due in respect of claims by the nationals of that Allied or Associated Power with regard to their property, rights and interests, including companies and associations in which they are interested, in territory of the former Austrian Empire, or debts owing to them by Austrian nationals, and with payment of claims growing out of acts committed by the former Austro-Hungarian government or by any Austrian authorities since July 28th, 1914 (the date of the declaration of war by Austria against Serbia), and before that Allied or Associated Power entered into the war. The amount of such claims may be assessed by an arbitrator appointed by M. Gustave Ador if he is willing, or if no such appointment is made by him, by an arbitrator appointed by the Mixed Arbitral Tribunal provided for in Section VI. They may be charged in the second place with payment of the amounts due in respect of claims by the nationals of such Allied or Associated Power with regard to their property, rights and interests in the territory of other enemy



Powers, in so far as those claims are otherwise unsatisfied." (Italics ours.)

We may now summarize and restate the substance of this Article:

All completed liquidations pursuant to the application of exceptional war measures or measures of transfer are confirmed by both Governments. Austria agrees to discontinue immediately all exceptional war measures or measures of transfer where liquidation has not been completed and to return the property to the owner. The United States is given the right to retain and liquidate all property rights and interests which have come under its control and may do so in accordance with its own laws.

*The Austrian Government agrees to compensate American nationals in respect of damage or injury inflicted upon their property rights or interests, and the United States may retain all property it has seized from Austrian nationals as security for this engagement to pay, undertaken by Austria. Wherever possible, restitution in specie must be made and where such restitution in specie cannot be made, an agreement arranged through the Powers or Clearing Offices (not between the individual parties) should be reached in order to make the United States national whole by the grant of advantages or equivalents which will be satisfactory to him.*

Except where restitutions in specie have been made, the net proceeds of enemy property, rights and interest shall be credited to the Power of which the owner is a national, in cases where the Clearing Office system was adopted; but between Austria and the United States, *the Austrian Government shall pay the net proceeds and cash assets in its possession belonging to an American national, directly to him or to the United States (for the owners behalf presumably), and the United States shall dispose of any net*

proceeds or cash assets in its possession belonging to an Austrian national in accordance with its laws, and *may* apply them in payment of claims and debts defined in Article 249 or in paragraph 4 of the Annex.

The sentence in paragraph 249 (h)2 providing that the United States may use the net proceeds and cash assets of an Austrian national at its disposal

“in accordance with its laws and regulations and may be applied in payment of the claims and debts defined by this Article or paragraph 4 of the Annex hereto,”

must be read in connection with the sentence in paragraph 249 (e) which says of these net proceeds and cash assets held by the United States that

“This property may be constituted as a pledge for enemy liabilities under the conditions fixed by paragraph 4 of the Annex hereto.”

The two sentences read together, in the light of paragraph 4 of the Annex to which both refer, unmistakably indicate the intention that the net proceeds of enemy property and cash assets held by the United States *may be constituted as a pledge or as security for the payment by Austria of the claims of American nationals against the Austrian Government and against Austrian nationals.*

An examination of these two Articles and their respective Annexes definitely establishes that Article 248 is confined solely to adjustments and payment, through Clearing Offices to be established, of reciprocal classes of “pecuniary obligations,” to wit, debts, interest and capital sums, *which had not been subjected to exceptional war measures or measures of transfer*, while Article 249 is confined to the treatment of *claims for damage and injury* resulting through the application of war measures and measures of transfer.

That Article 248 did not intend to deal with proceeds of liquidation, is clear from the last sentence of paragraph 4 of that Article, which provides:

*"The proceeds of liquidation of enemy property rights and interests mentioned in Section IV and in the Annex thereto will be accounted for through the Clearing Offices in the currency and at the rate of exchange hereinafter provided in paragraph (d) and disposed of by them under the conditions provided by the said Section and Annex."* (Italics ours.)

Furthermore, it appears from the same sentence that it was the understanding of the framers of the Treaty that Section IV, Article 249, was concerned with "proceeds of liquidation of enemy property, rights and interests," as distinguished from debts.

As already pointed out, it is clear that debts, *as such*, will not be valorized in virtue of Article 248, since, concededly, the thirty-day notice required to make the Article effective was not given.

It is equally clear that a *debt, as such*, will not be valorized in virtue of the provisions of Article 249 *unless its character as a debt has been changed, by the application of exceptional war measures or measures of transfer by Austria*, into a claim for net proceeds of property, rights and interests. The application of such measures would automatically remove the debt from the purview of Article 248 and place it within the purview of Article 249. This view is confirmed by the first sentence of paragraph 14 of the Annex to Article 249, which reads:

*"The provisions of Article 249 and this Annex relating to property, rights and interests in an enemy country, and the proceeds of the liquidation thereof, apply to debts, credits and accounts, Section III regulating only the method of payment."* (Italics ours.)

In other words, if bank deposits had been sequestered by Austria or any measure within the definition of paragraph 3 of the Annex to Article 249 had been applied against it, the American creditor would be entitled to all the rights granted to one having a claim for damage and injury to property, rights and interests under Article 249.

The plaintiffs base their claim for the valorization of their debt upon the language of the second sentence of paragraph 14 of the Annex to Article 249. This sentence reads as follows (we omit the irrelevant phrases and substitute "United States" for "the Allied or Associated Powers") :

"In the settlement of matters provided for in Article 249 between Austria and the United States  
 \* \* \* in respect of any of which a declaration shall not have been made that they adopt Section III, and between their respective nationals, the provisions of Section III respecting the currency in which payment is to be made and the rate of exchange and of interest shall apply unless the United States shall within six months of the coming into force of the present Treaty, notify Austria that one or more of the said provisions are not to be applied."

Because, concededly, the notice was not given by the United States, the plaintiffs insist that their *debt, as such*, must, in virtue of this sentence, be valorized, although no war measures whatever have been applied to it by Austria.

That this argument is unsound will readily appear from the following considerations.

It will be noted that the valorization and interest provisions of Article 248 are made applicable to Article 249 *only in the settlement of matters provided for in Article 249*: "In the settlement of matters provided for in Article 249 between Austria and the United States" the valorization provisions of Section III shall apply, unless notice

is given by the United States, within six months, to the contrary.

But we have just seen that the "matters provided for in Article 249" do not include the settlement of *debts, as such*, between the nationals of one of the countries and the nationals of the other. True, "debts, credits and accounts" are to be considered as property under the first sentence of paragraph 14 of the Annex. But that means simply, as we have already pointed out, that if war measures have been applied against any debts, credits or accounts, the owners thereof become entitled thereby to compensation for any damage and injury which they have suffered as a result. It can mean nothing else.

The importance of the third sentence in paragraph 4 of Article 248, as a point of articulation between Articles 248 and 249, now fully appears. We again quote it:

"The proceeds of liquidation of enemy property, rights and interests mentioned in Section IV and in the Annex thereto will be accounted for through the Clearing Offices in the currency and at the rate of exchange hereinafter provided in paragraph (d) and disposed of by them under the conditions provided by the said Section and Annex."

It clearly points out that Article 249 treats of *liquidations*, i. e., proceeds from the application of war measures, *as distinguished from* debts, credits and accounts which form the subject-matter of Article 248. At the same time it links up the valorization provisions of Article 248 (d) with Article 249, by making those provisions applicable to claims for compensation for damage and injury. *Such a linking up was necessary, for, otherwise, damage or injury claims of nationals of clearing States might have lost the benefits of valorization.*

On the other hand, it was necessary to link the valorization provisions of Article 248, in some manner, with the provisions of Article 249, *in order to reserve to non-clearing Powers the right to valorization of claims for damage and injury*. Instead of repeating the valorization provisions of Article 248 in full, which, indeed, it might have done, the Article merely states that "in the settlement of matters provided for in Article 249," that is to say, *in claims for compensation because of damage or injury*, the valorization provisions of Article 248 shall apply. In order to apply valorization to *debts, as such*, it is therefore necessary in some manner to link up debts with "matters provided for in Article 249," *in the settlement of which, alone*, those provisions apply. The extended argument of the plaintiffs' counsel fails to disclose such a link, for the simple reason that none exists.

The third sentence in paragraph 4 of Article 248 and the second sentence of paragraph 14 of the Annex to Article 249, when read together, yield without any difficulty the clear intention of the makers of the Treaty, that *non-clearing Powers shall be charged with valorization only in claims for compensation for damage or injury, i. e., in cases where war measures had been applied*.

We have up to this point confined the discussion to an analysis of the two Articles and their relation to each other in order to establish, *first*, that Article 248 is concerned exclusively with debts and that valorization under that Article will not lie because the United States did not give the notice prescribed; and *second*, that Article 249 is concerned exclusively with claims based upon the application of war measures and that under paragraph 14 of the Annex debts may become "matters provided for in Article 249," and thus subject to valorization *only* where they have been the subject of such war measures.

We will now inquire whether the provisions in question *were intended to apply in individual suits between the parties*, such as the suit at bar.

That inquiry is immediately and unequivocally answered so far as Article 248 is concerned.

Sub-paragraph (a) of that Article provides:

**"each of the High Contracting Parties shall prohibit as from the coming into force of the present Treaty both the payment and the acceptance of payment of all such debts and also all communications between the interested parties with respect to the settlement of the said debts otherwise than through the Clearing Offices."**

Paragraph 3 of its Annex provides:

**"The High Contracting Parties will subject contraventions of paragraph (a) of Article 248 to the same penalties as are at present provided by their legislation for trading with the enemy. They will similarly prohibit within their territory all legal process relating to payment of enemy debts except in accordance with the provisions of this Annex."**

How stands the case with Article 249?

The first intimation of the answer we find in the third sentence of Article 248 (4) which we have had so many occasions to quote. It provides that:

**"The proceeds of liquidation of enemy property rights and interests mentioned in Section IV and in the Annex thereto will be accounted for through the Clearing Offices," etc.**

Clearly, governmental action, rather than individual rights directly asserted between the parties, is contemplated by this clause of the Treaty.

Subdivision 249 (e) at once removes the question from the realm of conjecture into that of certainty. It provides that:

"Claims made in this respect (for damage or injury inflicted by the application of war measures) by such nationals shall be investigated and the total of the compensation shall be *determined by the Mixed Arbitral Tribunal* provided for in Section VI or by an arbitrator appointed by that Tribunal. *This compensation shall be borne by Austria.*" (Italics ours.)

Note that the claim is to be investigated and the amount due determined by the Mixed Arbitral Tribunal or its arbitrator. The reason is obvious. Since Austria is called upon to foot the bill it was considered proper and fair that a tribunal in which she was represented should participate in the determination of the damage.

The provision immediately following the sentence just quoted is illuminating. It says that enemy property held by the United States

"may be constituted as a pledge for enemy liabilities."

In other words, the seized property may be held by the United States as security for "this compensation (which) shall be borne by Austria." So that if Austria shall neglect or refuse to pay, the United States, *if it shall see fit to do so*, may have recourse to the security. In order that the lien thus imposed on the private property of enemy nationals shall be legal, Article 249 (j) provides that

"Austria undertakes to compensate her nationals in respect of the sale or retention of their property, rights or interests" in the United States.



Article 249 (e) refers to the Mixed Arbitral Tribunal. In order to learn the character and functions of this tribunal, we must go to Section VI which we have not discussed before. The complete text of Section VI (Article 256) and its Annex of nine paragraphs appear at the end of this brief. Subdivision (a) of that Article provides that within three months from the coming into force of the Treaty the Mixed Arbitral Tribunal shall be established between the United States on the one hand and Austria on the other. The tribunal shall consist of three members. Each of the Governments may choose one member. The president of the tribunal shall be chosen by agreement between both Governments.

Subparagraph (b) of this Article provides that

"The Mixed Arbitral Tribunals established pursuant to paragraph (a) shall decide *all questions* within their competence under Sections III, IV, V and VII." (Italics ours.)

Section III here referred to consists of Article 248 and its Annex, and Section IV consists of Articles 249 and 250 together with their Annex.

It thus appears that the Mixed Arbitral Tribunal is vested with exclusive jurisdiction—"shall decide *all questions*"—under Sections III and IV. Section IV (Article 249 (e)) provides for the investigation of claims for damage and injury and the determination of the compensation to be awarded by the Mixed Arbitral Tribunal. Under Article 256 (b), therefore, that Tribunal is *alone* clothed with power to pass on a claim based upon Article 249.

We believe it stands demonstrated that the provisions of Articles 248 and 249, together with their respective Annexes, have not, and were never intended to have, any application to private suits nor to operate on any private rights between individuals. The design of these Articles

sufficiently evidences their purpose. The two Governments, intending to protect the interests of their respective nationals, entered into a Treaty to which they alone were parties and which they alone could enforce unless rights of enforcement of particular parts of that Treaty were specifically reserved to the nationals.

It is true that in the Treaty of Vienna the United States reserved to itself and to its nationals all the

“rights, privileges, indemnities, reparations or advantages, together with the right to enforce the same”

to which the United States or its nationals became entitled by reason of the Treaty of St. Germain-en-Laye. But in invoking the rights under any provision of the Treaty of St. Germain-en-Laye due regard must be had to the rights accorded to Austria in such provision. Under Article I of the Treaty of Vienna (United States Treaty, Series No. 659, 42 Stat. L. 1946), it is provided that

“the United States, in availing itself of the rights and advantages stipulated in the provisions of that Treaty (referring to the Treaty of St. Germain-en-Laye) will do so in a manner consistent with the rights accorded to Austria under such provisions.”

Under Article 249 (e) a claim for damage or injury made by a United States national must be investigated by the Mixed Arbitral Tribunal or its arbitrator and the compensation determined by them. Under Article 256 (a) Austria has the right of representation on this Mixed Arbitral Tribunal and, therefore, has the right to participate in the determination of the amount of compensation to be awarded in a claim for damage or injury—a right which is not accorded to Austria in a suit under Section 9 of the Trading with the Enemy Act.

The plaintiffs' counsel concede on page 56 of their brief that

"in lieu of setting up the Mixed Arbitral Tribunal, the United States Government entered into a claims convention with Austria for the presentation and consideration of claims."

They add that

"the assessment by such Tribunal was not, however, an exclusive provision, for the United States under Article 249 was to have the right to retain and liquidate the property belonging to Austrian nationals within its territory and to carry out its liquidation in accordance with its laws."

The claims convention referred to is an agreement between the United States, Austria and Hungary (U. S. Statutes, 1925-1926, Part II, p. 221) in which the preamble recites that the signatories

"being desirous of determining the amounts to be paid by Austria and by Hungary in satisfaction of their obligations under the Treaties concluded by the United States with Austria on August 24, 1921, and with Hungary on August 29, 1921, which secured to the United States and its nationals rights specified in a joint resolution of the Congress of the United States of July 2, 1921, including rights under the Treaties of St. Germain-en-Laye and Trianon, respectively, have resolved to submit the questions for decision to a commissioner."

Article I of that Agreement provides that the

"three Governments shall agree upon the selection of a commissioner, who shall pass upon all claims."

The various claims within the jurisdiction of this commissioner are then enumerated as follows:

(1) Claims of American citizens arising since July 31, 1914, in respect of damage to or seizure of their property rights and interests;

(2) Other claims for loss or damage to which the United States or its nationals have been subjected with respect to injuries to or death of persons, or with respect to property rights and interests since July 31, 1914;

(3) Debts owing to American citizens.

It is obvious that the Tripartite Claims Commission erected under this Agreement is the equivalent of the Mixed Arbitral Tribunal referred to in Article 249 of the Treaty. Any argument relating to the jurisdiction and powers of the Mixed Arbitral Tribunal applies with equal force to the Tripartite Claims Commission. It is equally true of the Tripartite Claims Commission that it has exclusive jurisdiction to assess and determine the amounts to be paid by Austria and Hungary to nationals of the United States, whether for injury to property, rights and interests, or in satisfaction of debts under the provisions of Article 249 of the Treaty.

We should not be misunderstood. We do not claim that an American national must submit to this Tripartite Claims Commission any claim he has for damage or injury to his property, rights and interests, or for a debt owing to him by an Austrian national. He may, if he chooses, invoke the jurisdiction of the courts of the United States, as the plaintiffs have done here, under Section 9 of the Trading with the Enemy Act, or in any other suit. But when he invokes the jurisdiction of the courts he will not be entitled to the benefit of the valorization pro-

visions of Article 248, since in the determination of the amounts due, where valorization is sought under that Article, Austria, which is primarily responsible for the payment of any award made, is entitled to be heard.

To restate the proposition briefly, even at the hazard of repetitiousness, the plaintiffs have an election. They may enforce their claim through the courts of the country if they choose. In that case, the amount of their claim will be determined in accordance with general principles of law. If they desire to take advantage of the valorization provisions under the Treaty, they must prosecute their claim through the Tripartite Claims Commission, which has exclusive jurisdiction in that regard.

The views set forth in this point are supported by the decisions of the Circuit Court of Appeals (2nd Cir.) in the cases of *Guinness v. Hicks*, 299 Fed. 538, and *Zimmermann v. Hicks*, 7 Fed. (2nd Series) 443.

When the Supreme Court decided the case of *Guinness v. Hicks*, 296 U. S. 71, it stated at the end of its opinion that it was not necessary to pass on arguments based on Articles 296 and 297 of the Treaty of Versailles (which are homologous with Articles 248 and 249, respectively, the Treaty of St. Germain-en-Laye).

However, when this court decided the case of *Humphrey v. Deutsche Bank* (No. 224, October Term, 1926), it must implicitly have decided that the provisions of Articles 296 and 297 of the Treaty of Versailles did not apply to an action brought under Section 2 of the Trading with the Enemy Act to establish a debt such as the debt in this case, namely, a debt based upon a bank deposit in a foreign bank payable in foreign currency abroad. The reason this court did not pass on the Treaty question in the *Guinness* case was because there the debt was payable in the United States and had become due before the

war. Irrespective of Treaty provisions, therefore, it was payable in dollars in the United States, and the valorization provisions of the Treaty of Versailles were not material. Not so in the *Humphrey* case. In that case the debt was payable in marks in Germany and had been matured by a demand in June, 1915. If the valorization provisions of the Treaty of Versailles apply to a suit brought under Section 9 of the Trading with the Enemy Act to establish such a debt, the *Humphrey* case was squarely within the Treaty and valorization would have been permitted.

It is true that in the briefs of counsel submitted in the *Humphrey* case the question of the applicability of Articles 296 and 297 of the Treaty of Versailles relating to valorization was not argued. But it cannot be said that this court was not aware of these provisions. They had been urged for its consideration shortly before in the *Guinness* case. The briefs of counsel in the *Humphrey* case contained numerous allusions to the decision of the Circuit Court of Appeals of the Second Circuit, both in the *Guinness* case and in the *Zimmermann* case. In both these cases the applicability of those Treaty provisions had been fully discussed and rejected by the Circuit Court of Appeals. We, therefore, conclude that in spite of the fact that the opinion of the Supreme Court in the *Humphrey* case makes no direct reference to the rights of valorization under Treaty provisions of a foreign debt payable abroad, the question was before the court, nevertheless, and in holding that *Humphrey* was entitled to the judgment day value of his German mark deposit, the court intended to, and did, reject the theory that the provisions of the Treaty required that the debt be valorized.

The many Mixed Arbitral Tribunals erected under the terms of the Treaty between Governments of the Allied Powers on the one hand, and Germany, Austria or Bul-

garia, respectively, on the other, have had frequent occasion to pass on this question.

The decisions are reported in a series of publications entitled "Tribunaux Arbitraux Mixtes—Recueil Des Décisions," of which five volumes have already appeared. These publications could not very well be official, since they contain in chronological order the decisions handed down by the Anglo-German, Anglo-Austrian, Anglo-Hungarian, German-Belgian, Bulgaro-Belgian, Austro-Belgian, Hungaro-Belgian, Franco-German, Franco-Bulgarian and twelve other Mixed Arbitral Tribunals. That the publications, though not official, are absolutely authoritative there can be no question. The publications are issued under the auspices of the Presidents of the various Mixed Arbitral Tribunals and under the editorship of Gilbert Gidel, Professor of the Faculty of Law at the University of Paris. They are found in every law library of importance in the country and are, of course, available in the Library of Congress. We, therefore, think it not improper to cite these decisions in the usual way, namely, by reference to the Tribunal, name of the case, volume and page.

In the case of *Margaret Williams v. Berlinische Lebensversicherungs Gesellschaft* (decided July 24, 1925, Recueil, etc., vol. V, p. 322), the Anglo-German Mixed Arbitral Tribunal had squarely before it the question of valorization of debts as such.

The decision it handed down in that case is so clear, so carefully reasoned and so apposite that we feel justified in setting it forth substantially in full:

"At the hearing the British Government Agent contended that the Tribunal had arrived at a wrong conclusion in their Second Interlocutory Decision of Claim 631, *National Bank of Egypt v. Bank für Handel and Industrie And German Government*

(Recueil, vol. V, page 18), with regard to the rate of exchange and currency applicable to non-clearing debts. He contended that the Tribunal were mistaken in saying that Article 297 deals wholly with State Measures to which private property rights and interests had been subjected during the war. He relied particularly upon the opening words of Article 297. 'The question of private property, rights and interests in an enemy country shall be settled according to the principles laid down in this section and to the provisions of the Annex thereto.' He also referred to the well known words in the first part of paragraph 14 of the Annex to Section IV, Part X. 'The provisions of Article 297 and this Annex relating to property rights and interests in an enemy country and the proceeds of the liquidation thereof apply to debts, credits and accounts, Section III regulating only the method of payment.'

The Tribunal have reconsidered the question and they have arrived at the following result:

Quite apart from the express provision to be found in the first part of paragraph 14 of the Annex to Section IV, Part X of the Treaty, there is no doubt that debts are included in the words 'property, rights and interests' which head the said Section IV and are repeated in the first phrase of Article 297. But thereby the problem at issue is not solved. According to the second part of paragraph 14, the relevant provisions of Section III apply to such matters as are provided for by Article 297 between what may be called here, for convenience sake, non-clearing States, and between their respective nationals. The contention that, by virtue of the second part of paragraph 14, these provisions rule the payment of debts by the debtor can only be upheld *if it appears that such payment between the respective nationals is one of the matters provided for by Article 297*. After careful and renewed consideration, the Tribunal feel unable to find that this is the case. The first phrase of Article 297



merely refers to the provisions in Section IV, Part X, and the Annex thereto, by declaring that these provisions rule the question of private property rights and interest in an enemy country. *In other words, it merely indicated the field of application of these provisions* but it cannot be considered as itself providing for such matters and especially for the payment of debts between the nationals of non-clearing States. Such matters are to be looked for in the provisions themselves and that was rightly felt by the Counsel for the British Government Agent and the National Bank of Egypt, when they relied on Article 297 (a) as being the provision to which Part 2 of paragraph 14 could be considered as referring.

With regard to Article 297 (a) and the other parts of Article 297, the Tribunal, after renewed and careful consideration, feel it impossible to arrive at another conclusion than that declared by them in their decision in the Claim of the National Bank of Egypt v. German Government.

*In their opinion it cannot be said that payment of debts between the respective nationals of non-clearing States is a matter provided for in any of the provisions of Article 297, and, indeed, the Tribunal are confirmed in the view that this article deals with State measures. The only matter provided for between individuals appears in the isolated and exceptional provision in paragraph 5 of the Annex to Section IV, Part X of the Treaty, but that provision does not deal with debts and, moreover, paragraph 14, Part 2, refers only to Article 297 and not to the Annex thereto.*

As a result, the contention set up by the British Government Agent does not appear to be supported by the stipulation in the Treaty on which he relied and, in the opinion of the Tribunal, there remain the reasons given by them in their decision on the claim of the National Bank of Egypt and which have led them to the conclusion that as between the respective nationals themselves the Treaty has, with regard to payment of debts, provided nothing be-

*Smith &  
Hughes  
to be  
seen*

yond the State measures reserved to the Allied and Associated Powers by Article 297 (b) and by Article 297 (h) (2) and paragraph 4 of the Annex to Section IV, Part X of the Treaty." (Italics ours.)

In the decision of March 13, 1925, by the same tribunal in the case of *National Bank of Egypt v. German Government and the Bank for Commerce & Industry* (Recueil V, p. 18) the Tribunal said:

"Article 297 (a) deals exclusively with measures taken by the German Government, and so conversion into an allied currency at the pre-war rate of exchange would apply to German debts, but probably not to German claims, which are in no way affected by article 297 (a). *This currency and rate of exchange would be imposed on the German debtor only because and in as much as the German government had subjected the debt to an exceptional war measure.*" (Italics ours.)

We have, of course, given the quotation as it appears in the text of the opinion; but we believe the Tribunal inadvertently interchanged the word "debts" in the fourth line of the quotation with the word "claims" in the fifth. This appears evident from the context.

Further on, the Tribunal say:

"Desirous not to overlook any aspect which the problem at issue may present, the Tribunal have also considered whether the Treaty disclosed on the part of the signatory powers, a common intention of setting up as a general principle ruling the settlement of debts between their respective nationals, the conversion into an allied currency at the pre-war rate of exchange provided for in article 296 and paragraph 14 of the annex to section IV, Part X. *But this is not the case. On the contrary, it is a striking fact that with regard to those States which have adopted section III, the benefit of this*

*conversion is not extended to debts not to be settled through the Clearing Offices."* (Italics ours.)

They say further:

"The notes exchanged during the peace negotiations between the German delegation and the delegates of the Allied and Associated Powers show that the question of currency of payment and of the rate of exchange was discussed between them only with regard to section III and it may be assumed that, if the signatory powers had contemplated such a sweeping measure as the settlement at the pre-war rate of exchange of all debts whatsoever between their respective nationals, in the absence of a clearing system, they would have inserted in the treaty a clear and express provision for that purpose and they would not have thought of deciding it in four words inserted incidentally in what might appear to be an enigmatic provision in a paragraph of the annex to a section which deals not with the settlement of debts between the private parties concerned, but with measures taken by the States in that respect." (Italics ours.)

To the same effect as the foregoing, is the decision of the German Polonian Mixed Arbitral Tribunal in the case of *Michalowski v. Deutsche Bank* (Recueil V, p. 463); Serbo Bulgarian Mixed Arbitral Tribunal, in the case of *Dame Klopner v. Banque Generale de Bulgarie* (Recueil III, p. 420); Anglo Bulgarian Mixed Arbitral Tribunal, in the case of *Stevenson & Co., Ltd., v. Banque Nationale del Bulgarie* (Recueil II, p. 77); German-Czechoslovakian Mixed Arbitral Tribunal, in the cases of *Zundhutchen v. Patronen Fabrik A. G. v. Westbank A. G.* (Recueil III, p. 982) and *Goldschmidt v. Heesch Hinrichsen & Co.* (Recueil IV, p. 530).

In the case of *Pegamoid v. The German Government and Deutsche Staats Bank* (Recueil III, p. 561), decided by the Belgo German Mixed Arbitral Tribunal, a debt was

valorized upon the ground, expressly stated, that it had been subjected to war measures.

The same tribunal in the case of *Cia des Metaux Overpelt-Lemmel v. Mitteldeutsche Credit Bank* (Recueil V, p. 83) considered a debt which had become due during the war, but had not been subjected to any war measures. The tribunal rejected the claimant's contention that the debt should be valorized, regardless of the application of exceptional war measures, and refused valorization.

### B.

The Treaty of St. Germain-en-Laye was signed on September 10, 1919. Article 381 of that Treaty, among other things, provides as follows:

"A first proces-verbal of the deposit of ratifications will be drawn up as soon as the Treaty has been ratified by Austria on the one hand and by three of the principal Allied and Associated Powers on the other hand.

From the date of this first proces-verbal the Treaty will come into force between the High Contracting Parties who have ratified it. For the determination of all periods of time provided for in the present Treaty, this date will be the date of the coming into force of the Treaty.

In all other respects, the Treaty will enter into force for each Power at the date of the deposit of its ratification."

The first proces-verbal of the deposit of ratifications was drawn up on July 16, 1920, and was signed on that day in Paris, thus bringing the Treaty in force as of that day.

The United States did not ratify the Treaty. The Joint Resolution of Congress, approved July 2, 1921, however, declared the state of war between the United States and Austria at an end, and reserved to itself and its nationals

"any and all rights, privileges, indemnities, reparations or advantages, together with the right to enforce the same, to which it or they have become entitled under the terms of the Armistice signed November 3rd, 1918, or any extension or modifications thereof; or which were required by or are in the possession of the United States of America, by reason of its participation in the war or to which its Nationals have thereby become rightfully entitled; or which under the Treaty of St. Germain-en-Laye or the Treaty of Trianon have been stipulated for its or their benefit; or to which it is entitled as one of the principal Allied and Associated Powers; or to which it is entitled by virtue of any act or acts of Congress or otherwise" (Sec. 4, Joint Resolution of Congress, approved July 2, 1921).

On August 24, 1921, the Treaty of Peace between the United States and Austria, known as the Treaty of Vienna, was signed at Vienna.

That Treaty contained the following provision (Art. 2, Sec. 5) :

"That the periods of time to which reference is made in Article 381 of the Treaty of St. Germain-en-Laye shall run with respect to any act or election on the part of the United States from the date of the coming into force of the present Treaty."

#### Article 3:

"The present Treaty shall be ratified in accordance with the Constitutional forms of the High Contracting Parties and shall take effect immediately on the exchange of ratifications which shall take place as soon as possible at Vienna."

This Treaty was ratified by Austria on October 8, 1921, and by the United States on November 8, 1921, and by its terms came into force on November 8, 1921.

Where a treaty fails to specify the time as of which it shall come into force, it is deemed to come into force upon its ratification.

In the case of *Haver v. Yaker*, 76 U. S. 32, Mr. Justice Davis, delivering the opinion for a unanimous court, said (p. 34) :

"It is undoubtedly true, as a principle of international Law, that as respects the rights of either Government under it, a Treaty is considered as concluded and binding from the date of its signature. In this regard the exchange of ratification has a retroactive effect, affirming the Treaty from its date. But a different rule prevails where the Treaty operates on individual rights. The principle of relation does not apply to rights of this character, which were vested before the Treaty was ratified. In so far as it affects them, it is not considered as concluded until there is an exchange of ratifications, and this we understand to have been decided by this Court in *Arredondo's* case, reported in 6th Peters (page 749)." (Italics ours.)

To the same effect it was held in the case of *Dooley v. The United States*, 182 U. S., at p. 230.

The rule was applied in the late case of *De Bian v. Normandy Order Co.*, 228 Fed., at p. 240 (a decision of the District Court of N. J.).

In the case of *U. S. v. Grand Rapids*, 91 Cir. Ct. of App. 265, 6th Cir., at p. 269, the rule is repeated as follows :

"While it is a principle of international law that a treaty takes effect by relation as of the date it was signed although not ratified until later, this is only so as between the contracting nations. Private rights are not effected by such a treaty until it is ratified; for only then by our Constitution does it become the law of the land. This is a distinction well settled by the decisions." (Italics ours.)

The opinion cites in support:

*U. S. v. Arrendondo*, 6 Peter 691.

*Davis v. Parish, etc.*, 9 Howard 280.

*Haver v. Yaker*, 76 U. S. 32.

*Shepard v. Life Insurance Company*, 40 Fed. 341.

Under these authorities, even if nothing was contained in the Treaty of St. Germain, or in the Treaty of Vienna, specifying the time when each shall come into force, the Treaty of St. Germain would have come into force no earlier than on July 16, 1920, and the Treaty of Vienna on November 8, 1921.

The conclusion is rendered impregnable by the provisions of the Treaties themselves (Art. 381 of Treaty of St. Germain; subdiv. 5 of Art. 2 and Art. 3 of Treaty of Vienna).

No right or benefit could accrue to the United States or any of its citizens under these Treaties before November 8, 1921 (the ratification of the Treaty of Vienna). None certainly could accrue before July 16, 1920 (the ratification of Treaty of St. Germain). *But the defendant bank made the deposit on April 1, 1920, which was long before the Treaty came into force.*

Even if it were to be conceded that the Treaty is effective to control the method of payment of a debt from a foreign national, where such debt was in existence at the time that the Treaty came into force, it could not be effective on debts which had become discharged before it came into force. The Treaty had no retroactive power; it could not alter events which had happened before it was born. Suppose the debt had been discharged on April 1, 1920, by a payment to plaintiffs instead of by deposit. Could they, on the coming in force of the Treaty, claim the difference between the rate at which payment had been accepted and the rate specified in the Treaty? We venture

to say no. Yet one method of discharge is as good as another, provided it is sanctioned by law or by agreement between the parties.

On April 1, 1920, when the defendant bank made the kronen deposit under Section 1425, the Treaty of St. Germain-en-Laye may have been one of those events which cast their shadows before; it may have been a hope to some; a fear to others; an expectation to all; but it was not a treaty and neither imposed its obligations on the defendant bank nor conferred its benefits on the plaintiffs.

#### POINT IV.

If the court deposit made by defendant bank on April 1, 1920, should be held ineffective as a discharge, the plaintiffs are entitled to recover their pre-war kronen balance, without interest until April 1, 1920, but with  $2\frac{1}{2}$  per cent. interest thereafter at the judgment day rate only, because A—this case is governed by the rule in *Humphrey's* case, B—no account was stated, C—the debt being a bank balance could be matured only by a demand, and a demand has not been made, and D—the outbreak of the war did not mature the debt.

#### A.

In the case of *Die Deutsche Bank Filiale Nurnberg v. Humphrey*, No. 224, October Term, 1926, this court squarely held that in a suit brought by an American citizen under Section 9 of the Trading with the Enemy Act to establish and recover a German mark bank balance due from a German bank and payable in Germany, the plaintiff may recover only at the "judgment day rate." We use this phrase as the equivalent of "the moment when



the suit is brought" (the words used in the *Humphrey* opinion) in order to distinguish this measure of recovery from the "breach day" measure. It will be conceded, we think, that in this suit there is no difference in the amount of damage that may be assessed between the date of judgment and the date when suit was brought.

The stipulated facts in the case at bar establish that the defendant bank, a Vienna banking corporation, with no office in the United States, received from the plaintiffs, American citizens, before the war, kronen deposits which were payable on demand at its banking house in Vienna (R. 103 *et seq.*). The situation being precisely the same as in *Humphrey's* case (except that the defendant bank denies any breach on its part), the rule there established should apply.

But the plaintiffs' counsel argue that the proper precedent to follow is the case of *Guinness v. Hicks*, 269 U. S. 71, where this court held that in a suit under the Trading with the Enemy Act brought by an American citizen against a German debtor to recover a mark debt due and payable in the United States, the plaintiff may recover at the "breach day" rate.

Their argument (Plaintiffs' Brief, pp. 22 *et seq.*) may be concisely summed up as follows:

The only point of difference between the records of the two cases is that in the *Guinness* case "the plaintiffs resided in the United States" at the time of the breach, whereas, "in the *Humphrey* case, at the date of demand, the plaintiff *was* in Germany." Since the Supreme Court said that Guinness' debt was payable in the United States and Humphrey's in Germany, it follows that in the Supreme Court's opinion Humphrey's *presence* (not *residence*, please note) in Germany at the time he made his demand there gave his debt a German situs.

We have no doubt whatever that the plaintiffs' distinguished counsel have misread the records in the two

cases. For it appears in both that the plaintiffs were citizens and residents of the United States, not only at the time suit was brought, but also at the time the alleged breach occurred. True, Humphrey testified, and the trial court found, that he had orally demanded his bank balance in Nurnberg in 1915. But counsel's inference from that circumstance alone, that the situs of the debt was in Germany and that that was the point of distinction this court found between the cases, is without basis. It will be granted that the situs of a debt is the domicile of the creditor. This does not mean, however, that a debt acquires a new situs each time the creditor *visits* a new locality.

The differences in fact upon which this court based its distinction in ruling are plain.

The parties in the *Guinness* case stipulated the facts. It appears from the stipulation that the plaintiffs therein named were residents of the United States and that the defendants, residents of Germany, and enemies, owed them a certain sum in marks upon an account stated under the date of December 31, 1916, acknowledged by them. *The stipulation does not state where the debt was payable. Nor does it state that the defendants were bankers, or that the debt was a bank balance.* By implication of law, therefore, the debt was payable in the United States, the domicile of the creditor.

The *Humphrey* case presents a totally different state of facts, both by oral testimony and by stipulations of evidence. It appears there, that while Humphrey was indeed a resident of California and a native born citizen of the United States, the debt he sought to recover was *a bank deposit in marks, payable on demand in a banking house at Nurnberg, Germany.* Therefore, to quote Mr. Justice Holmes, in his decision for the majority in the *Humphrey* case (*The Deutsche Bank Filiale, Nurnberg, Petitioner, v.*

*Charles Franklin Humphrey*, No. 224, October Term, 1926, decided November 23, 1926):

"Unlike *Hicks v. Guinness*, 269 U. S. 71, at the date of the demand, the German bank owed no duty to the plaintiff under our law. It was not subject to our jurisdiction and the only liability that it incurred by its failure to pay was that which the German law might impose. It has incurred no additional or other one since. A suit in this country is based upon an obligation existing under the foreign law at the time when the suit is brought, and the obligation is not enlarged by the fact that the creditor happens to be able to catch his creditor here. *Davis v. Mills*, 194 U. S. 451. See *Western Union Telegraph Co. v. Brown*, 234 U. S. 542. We may assume that when the bank failed to pay on demand its liability was fixed at a certain number of marks both by the terms of the contract and by the German law—but we also assume that it was fixed in marks only, not at the extrinsic value that those marks then had in commodities or in the currency of another country. On the contrary we repeat, it was and continued to be a liability in marks alone and was open to satisfaction by the payment of that number of marks, at any time, with whatever interest might have accrued, however much the mark might have fallen in value as compared with other things. See *Societe Des Hotels Le Touquet Paris Plage v. Cummings* (1922), 1 K. D. 451. An obligation in terms of the currency of a country takes the risk of currency fluctuations and whether creditor or debtor profits by the change, the law takes no account of it. Legal tender cases. 12 Wall. 457, 548, 549. Obviously in fact, a dollar or a mark may have different values at different times, but to the law that establishes it, it is always the same. If the debt had been due here and the value of dollars had dropped before suit was brought, the plaintiff could recover no more dollars on that account. A foreign debtor should be no worse off."

Which fits the defendant bank's case here precisely; for here, as in the *Humphrey* case, the plaintiffs deposited kronen in an Austrian bank in Vienna, there repayable in kronen on demand. We quote from the stipulation of facts in the instant case (R. 36):

"For a number of years preceding the outbreak of the war between the United States and Austria, plaintiffs maintained a bank account in kronen with the defendant, the Wiener Bank Verein, in which the plaintiffs from time to time made deposits in kronen for the purpose of providing payments of drafts and orders issued and transmitted by the plaintiffs by letter, cable, wireless or otherwise and drawn on and payable at the defendant, Wiener Bank Verein, at Vienna."

The appropriate precedent to be followed is, therefore, the rule in the *Humphrey* case, and not the rule in the *Guinness* case.

In declaring in favor of the "judgment day" rule as opposed to the "breach day" rule, the Supreme Court did not establish any novel proposition of law. On the contrary, it followed the course adopted by the soundest judicial authorities on the question, here and in England.

*Sirie v. Godfrey*, 196 A. D. (N. Y. 529.

*Marburg v. Marburg*, 26 Md. 8.

*Grant v. Healey*, 5 Sumner 523.

*Smith v. Shaw*, 2 Wash. 167.

*Lee v. Willcocks*, 5 Serg. & Rawlins 48.

*Hawes v. Wolcock*, 26 Wis. 629.

*The Hurona*, 268 Fed. 910.

*Liberty National Bank v. Burr*, 270 Fed. 251.

*Societe des Hotels etc. v. Cummings* (1922), 1

K. B. 451.

So that our argument may be complete, we shall quote pertinent passages from some of the cases just cited. If the Court, in view of the *Humphrey* case, should think that unnecessary, we respectfully suggest that they pass immediately to page 74, where the discussion of the second subdivision of this point begins.

In the case of *Sirie v. Godfrey*, 196 A. D. 529, the defendant in New York was indebted to the plaintiff in France in the sum of 10,450 francs. The debt arose upon the sale of apparel at Paris, France, in 1913 and 1914. The plaintiff commenced an action in New York in 1920, claiming to be entitled to the sum of \$2,004.79, which was the equivalent of 10,450 francs, the purchase price of the wearing apparel, according to the rate of exchange prevailing in 1913 and 1914.

The Court (Merrell, J.) unanimously affirming the Trial Court, said:

"I think the Court correctly decided that the contract between the parties was a simple one of sale of merchandise to be paid for by the defendant in French francs. I am further of the opinion that, even assuming that the defendant failed to pay said indebtedness when the same became due, nevertheless, the plaintiff cannot recover upon the trial the American equivalent of 10,450 francs, the purchase price of said merchandise, at the rate of exchange at the time said indebtedness was payable, but that at most the plaintiff was entitled to recover in American money the equivalent of the French francs stipulated in the contract at the rate of exchange prevailing at the time of the rendition of judgment.

This was a French contract for the sale in France of French goods for which the purchaser agreed to pay in French francs at Paris, France.

At any time before suit was brought, the defendant could have tendered the plaintiff at Paris,

France, the 10,450 francs in full payment of her claim, and plaintiff would have been compelled to accept the same. Indeed, as late as October 4th, 1919, but seven months prior to the commencement of the action, in her letter to defendant, the plaintiff claimed no more than payment of the 10,450 francs in discharge of defendant's indebtedness to her. *The purchase price of the goods in question was not payable in American dollars, nor was it payable in German marks. It was payable in French francs and by merely bringing action in this jurisdiction, the plaintiff, I apprehend, acquired no right to a more favorable judgment than she could have obtained had action been brought in France. \* \* \** I am of the opinion that the plaintiff was entitled to recover judgment herein against the defendant upon the proofs presented for the equivalent in money of the United States of America of 10,450 francs at the rate of exchange prevailing at the time of the trial." (Italics ours.)

In the case of *Marburg v. Marburg*, 26 Md., p 8, the facts were (as stated by the Justice writing for the court of last appeal) as follows:

"This suit was brought to recover a balance due for goods sold to the appellant at Frankfort on the Main. The claim stated in the bill of particulars to be 26317.44 florins is admitted and it appears that this sum, by an agreement between the parties, was to be paid to the appellee in florins at Frankfort, the place of his residence. The only question in the case related to the method or rule for ascertaining the money recoverable in the currency of this country to pay the debt payable in Frankfort in florins."

The Reporter states the Court's ruling in the syllabus as follows:

"A creditor suing here for an amount payable in a foreign country in the currency of that country

is entitled to recover in the currency of this country an amount sufficient to produce the sum of the debt where it was made payable, or in other words, an amount equal to what he must pay to remit the debt to the place where it was payable; and the amount so recoverable should be computed according to the rate of exchange at the time of the trial or judgment."

The opinion is an interesting one and deserves extended quotation.

"This subject has been discussed in American as well as in the English Courts, and the same doctrines as we think have been finally settled in both. \* \* \* Story, J., in *Grant v. Healey*, 3 Sumner 523, said:

'That whenever a debt made payable in one country is sued upon in another, the creditor is entitled to receive the full sum necessary to replace the money in the country where it ought to have been paid, with interest for the delay, for then, and then only, is he fully indemnified for the violation of the contract. In every such case the plaintiff is therefore entitled to have the debt due to him first ascertained at the par of exchange between the two countries and then to have the rate of exchange added or subtracted from the amount as the case may require in order to replace the money in the country where it ought to have been paid.'

This doctrine he propounded as one founded upon principles of reciprocal justice. In the case of *Lee v. Willcocks*, 5 Serg. & Rawlins, 48, the Court declares the settled rule to be,

'Where foreign money is the object of the suit, to fix the value according to the rate of exchange at the time of trial,' and the same rule was applied in the case of *Smith v. Shaw*, 2 Wash. 167. \* \* \* The best considered cases bearing on this question are collated in 3 Kent's Comm. 317 (note), and in 2 Par. Notes & Bills, 370, and the rule adduced from them is, that a creditor suing here for an amount payable

to him in a foreign country, in the currency of that country, is entitled to recover an amount sufficient to produce the sum of the debt where it was made payable, or in other words, an amount equal to what he must pay to remit the debt to the place where it was payable. It will also be seen from the authorities referred to that the amount recoverable should be computed according to the rate of exchange at the time of the trial or judgment."

The case of *Lee v. Willcocks*, cited in the foregoing opinion, was a Pennsylvania case, in which the court stated the "settled rule" as follows:

"With regard to the Turkish piaster there has been an evident mistake \* \* \* the settled rule is where foreign money is the object of the suit to fix the value according to the rate of exchange at the time of the trial."

In the leading Wisconsin case, *Hawes v. Wolcock*, 26 Wisc. 629, at p. 636, the court formulates the "true rule" as follows:

"In view of these uncertainties and fluctuations in the rate, upon grounds of policy as well as for its tendency to do as complete justice between the parties as is possible, we have come to the conclusion that the true rule in such cases is to give judgment for such an amount as will, at the time of the judgment, purchase the amount due on the note in the funds or currency in which it is payable. To accomplish this of course the premium should be estimated at the rate prevailing at the time of trial. By this rule the holder would neither gain nor lose by the fluctuations of the rate, but whenever he obtained a judgment, would obtain it for a sum which would then procure him the exact amount to which he was entitled in the proper currency. This does complete justice between the parties and serves therefore to indicate the true extent to which the



difference in such cases should affect the amount of recovery."

In the case of *The Hurona*, reported in 268 Fed. Rep., p. 910, advances were made at Marseilles, France, by the libelant to the master of the steamship Hurona, amounting to some 119,000 francs, between June 3rd and July 3rd, 1919. The steamship was libeled in New York for failure to repay these advances. The rate of exchange of French francs at the time the advances were made was 6.85 francs to the dollar, but at the time of trial the exchange was 13.20 francs to the dollar.

The only question before the court was: Which rate of exchange should be adopted in giving judgment; the rate prevailing at the time the advances were made or the rate prevailing at the time of trial? The District Judge followed the American rule in an opinion from which we quote:

"I think there can be no doubt that the amount due from the vessel to the libelant was payable in France, where the advances were made and the services rendered. The only obligation of the vessel was to pay 119,007.65 francs in France; so long as this is performed, and that number of francs, plus interest, is paid to libelant, its claims are fully satisfied, and it is completely indemnified. This is, therefore, purely a case of transmitting funds from one country to another, and of rendering a decree which will enable the libelant to have the amount of money in francs which was due to it in France on the 12th day of July, 1919.

The dictum of Mr. Justice Story in *Grant v. Healey*, Fed. Case No. 5,696, and of Mr. Justice Washington in the case of *Smith v. Shaw*, Fed. Case No. 13,107, likewise the decision of the Supreme Court of Wisconsin in *Hawes v. Wolcock*, 26 Wis. 629, are in accord with my conclusion."

The same question arose in the Federal jurisdiction for the Pennsylvania district, in the case of *Liberty National Bank of N. Y. v. Burr*, 270 Fed. Rep. 251.

In a closely reasoned opinion, the court decides the rule in conformity with the rule in New York, Wisconsin, Maryland and with the Federal rule. We quote from that opinion :

"The promise was to pay in pounds sterling. The cause of action is based upon what by the acceptance is the equivalent of the promissory note of the defendant payable in pounds sterling. Any judgment entered must be for a sum expressed in the money of account of the U. S. The only controversy is over the fixing this sum \* \* \* a promise to pay a sum of money, expressed in the terms of any money of account is kept by payment in that money. Putting the same thought in the concrete, a man who promises to pay a thousand pounds sterling, keeps his promise if he pays a thousand pounds sterling at the maturity of the note or other obligation he has given, and although he does not keep his promise to pay the note at maturity, if he pays at a later date, he none the less meets his obligation if he later pays the thousand pounds with interest for the delay \* \* \*. This means he must pay at the rate of exchange prevailing at the time of payment. Applying this principle for the determination of the sum for which the judgment should be entered, it would be entered in accordance with the ruling in *Lee v. Wilcocks*. The recovery of judgment for a debt may not always be the practical equivalent of receiving payment of that debt; but it is easy to understand that one may be the legal equivalent of the other, and practically works out the same result if and when the judgment is eventually paid. We say this because the plaintiff in the judgment receives, plus interest, precisely what he would have received had the promise of the debtor been redeemed at the time the judgment was entered."

From the opening of the account and thereafter the defendant bank credited the plaintiffs' account with interest at  $2\frac{1}{2}$  per cent. per annum.

"In the quarterly statements of account rendered by the defendant bank to the plaintiffs, the fact that interest was so credited at such rate was shown and the plaintiffs did not object to the rate \* \* \*" (Stipulation of Facts, R. 47, fol. 140).

In the case of *Warren v. Tyler*, 81 Ill. 15, the court said:

"Tyler, in his testimony, states that his firm had been charging appellant seven per cent. in their dealings with him, and he had been paying it. This, in the absence of proof to the contrary, was evidence from which an agreement to pay that rate might be inferred."

We submit that there being no evidence of what the legal rate in Austria is or whether there is a legal rate prescribed, the conventional rate should be approved since the parties themselves fixed it. The deposit in court included interest at the agreed rate down to the date of deposit; the defendant bank, therefore, deposited the entire debt *including interest* to the date of deposit, regardless of whether or not there had been a default, a breach or an acceleration of maturity.

Furthermore, the account was subject to the law of Austria. There is no evidence that the rate agreed upon is not the legal rate. The presumption is that the conventional rate is not different from the legal rate. It follows that the rate of  $2\frac{1}{2}$  per cent. is the proper rate to compute after April 1, 1920.

## B.

The plaintiffs claim that an account was stated as of April 6, 1917 (p. 25 of their brief).

The only evidence to support this claim is a letter from the defendant bank dated *April 1, 1920*, and received by plaintiffs *April 23, 1920*, in which defendant bank states that the plaintiffs' pre-war balance as of April 6, 1917, was K3,331,799.03 (R. 108, fol. 322; R. 111, fol. 333).

We understand an account stated to be an agreement by both parties that the balance as struck therein against one of them, is correct. (We will discuss the legal aspects of an account stated later.) The plaintiffs here could not have agreed to the account before *April 23, 1920*, when they received the letter of the defendant bank, dated *April 1, 1920*, containing the alleged account.

It follows that there was no account stated prior to April 1, 1920, the date of the court deposit relied on by the defendant bank as a discharge.

*But we submit that there was no account stated at any time.*

Before discussing the law of an account stated, it should be remarked that references to the *Guinness* case in this connection are misleading. Neither the Trial Court nor this Court was called upon to decide whether the transactions between the parties in the *Guinness* case gave rise to an account stated. *The parties themselves stipulated in that case that*

"On April 6th, 1917, the defendant, Delbrueck, Schickler & Co., was indebted to said firm of Ladenburg, Thalmann & Co. in the sum of Marks 1079.35 as of *January 1st, 1916*, as shown by an account stated, dated *December 31st, 1916*, duly acknowledged by the defendant, Delbrueck, Schickler & Co." (Italics ours.)

There is no such stipulation in the case at bar.

In their brief, counsel for the plaintiffs say (Plaintiffs' Brief, pp. 26-27) that the defendant bank *admits the account stated* in paragraph 6 of the stipulation (R. 37) and in paragraph 8A amending the stipulation (R. 47), in the following language:

"On or about the first day of April, 1920, the defendant, the Wiener Bank Verein, deposited in the Circuit Court for the Interior at Vienna, in Part 6 thereof, the number of kronen in its bank stated to be due and owing to the plaintiffs as of April 6th, 1917."

And again:

"The deposit made in the Circuit Court of Vienna, Part 6, on April 1st, 1920, of the number of kronen in defendant bank stated to be due and owing to the plaintiffs as of April 6th, 1917, included a further sum of kronen sufficient to equal two and one-half per cent. per annum interest down to April 1st, 1920, the date of such deposit on the amount stated to be due and owing to the plaintiffs as of April 6th, 1917."

If counsel mean to intimate that by the words "stated to be due and owing to the plaintiffs as of April 6, 1917," defendant bank in *December, 1923*, admitted, intended to admit, *or was understood by plaintiffs to admit* that there was an account stated between the parties as of April 6, 1917, they are entirely wrong. No such admission was intended, and the words fairly interpreted, fail to convey it. The words "stated to be due and owing" obviously refer to the bill of complaint—the amount stated by the *plaintiffs* therein to be due and owing. The word "stated," as used, clearly is synonymous with "claimed" or "alleged" and the words "due and owing" are those used in the bill of complaint. Obviously, if an ad-

mission had been intended, the stipulation would have said simply, "The number of kronen in its bank *due and owing*," etc., and not "*stated to be due and owing*." Needless to say, the Circuit Court of Appeals rejected the plaintiffs' construction (which, incidentally, *they did not urge in the District Court*).

Plaintiffs' counsel also point out (Plaintiffs' Brief, p. 27) that the court deposit of April 1st, 1920, included interest at  $2\frac{1}{2}$  per cent. per annum, on the balance, down to the date of deposit, and argue that

"nothing could more clearly demonstrate their (defendant bank's) understanding that the effect of the statement of the account was to create a new obligation immediately due upon which interest would accrue."

This we fail to see. Interest at the rate of  $2\frac{1}{2}$  per cent. per annum had been regularly credited to the plaintiffs' account from the time it was opened (R. 47). The court deposit would not have been effective if the interest had been withheld. We see no difference between the legal effect of an interest credit made before April 6th, 1917, and one made later.

Let us now see how the courts have defined an account stated.

This court has held in the case of *Toland v. Sprague*, 37 U. S., p. 335, that:

"The mere rendering of an account does not make it a stated one, but that if the other party receives the account, admits the correctness of the items, claims the balance, or offers to pay it, as it may be in his favor or against him; then it becomes a stated account."

The New York Court of Appeals in the case of *Volkening v. De Graaf*, 81 N. Y. 268, at p. 270, held that:

"An account stated is an account balanced and rendered, with an assent to the balance express or implied; so that the demand is essentially the same as if a promissory note had been given for the balance."

Mr. Chief Justice Folger, after giving his definition, says (p. 271):

"The emphatic words of a count upon an account stated were, in former days, *insimul computassent*, that they, the plaintiff and defendant, accounted together; and the count went on to say that on such accounting the defendant was found in arrear and indebted to the plaintiff in a sum named, and being so found in arrear, he undertook and promised to pay the same to the plaintiff."

In the case of *Stenton v. Jerome*, 54 N. Y. 480, the court answers as follows the question "But what is an account stated?":

"It takes two parties to make one, the debtor and the creditor. There must be a mutual agreement between them as to the allowance and disallowance of the respective claims, and as to the balance as it is struck upon the final adjustment of the whole account and demands of both sides. Their minds must meet as in making other agreements and they must both assent to the account and the balance as correct."

In the case of *Spain v. Talcott*, 165 App. Div. (N. Y.) 815, the court said that:

"The theory upon which rests the finality of an account stated is that it represents an agreement reached by the parties."

And it has been held by the New York Supreme Court in the case of *Downes v. The Phenix Bank*, 6 Hill. 297, that no account stated, in the technical sense, arises in a case where a bank strikes a balance upon a plaintiff's bank book. We do not suppose that any distinction exists between striking a balance on a customer's bank book, which was the method used by banks in the past in writing up a customer's book—"balancing" it, and rendering a monthly or other periodic statement of the account, which is the method used by most banks to-day and the method necessarily used where the banker and depositor reside in different countries. We quote the following passages from the opinion:

"The contract to be implied from the usual course of the business is that a banker shall keep the money until it is called for. \* \* \* Some stress has been laid upon the fact that a balance had been struck upon the plaintiff's bank book by one of the clerks in the bank. That was but the ordinary transaction of writing up the customer's book or, in other words, setting the debits or sums which had been paid upon his checks, against the credits which were given in the book at the time the deposits were made. *It only rendered the account complete up to the time when the balance was struck. It furnished no evidence of a change of the contract upon which the money was received in deposit.*" (Italics ours.)

And again:

"I think the understanding between the parties (bank and depositor) is that the money shall remain with the banker until the customer, by his check, or in some other way, calls for its repayment. \* \* \* *The banker is not in default and no action will lie until payment has been demanded.* No one could desire to receive money in deposit for an indefinite period with a right in the depositor



to sue the next moment and without any prior intimation that he wished to recall the loan. I do not find that the point has ever been decided, but it may be that this is the first case where a man has sued his banker without first drawing on him for the money." (*Italics ours.*)

In conclusion, we would point out that under the *Humphrey* case (*Die Deutsche Bank etc. v. Humphrey, supra*) it is quite immaterial whether or not an account was stated as of April 6, 1917, or as of any other date. All the depositor can recover, *even if his bank defaults in payment*, is the number of marks due him with whatever interest might have accrued since the default, expressed in terms of United States dollars at the rate of exchange prevailing "at the moment when suit is brought."

### C.

A bank is not required to pay out a depositor's money until he demands it.

*Downes v. Phoenix Bank*, 6 Hill (N. Y.) 297.

*Clare & Co. v. Dresdner Bank* (1915), 2 K. B. 576.

The plaintiffs' counsel do not dispute this, but argue on page 46 of their brief that a demand was made by them on March 25, 1919, by filing a notice of claim in the office of the Alien Property Custodian pursuant to Section 8 (a) of the Trading with the Enemy Act.

The notice referred to (R. 56) appears on its face to be the usual notice prepared by the Alien Property Custodian's office for use by claimants *under Section 9 of the Act*. It states that the nature of the claim made therein is as follows:

<i>"Value</i>	<i>Cash Balance</i>	<i>Face or Par Value of Securities</i>	<i>Total Amount</i>
\$	50.02		50.02
Kronen	2,951,027.31	1,080,800.	4,031,827.33

Interest accrued from 1/1/16

Cash bal. at 4%

On securities (see statement filed 2/3/19)."

Section 9, under which this notice was filed, stripped of language not relevant here, provides that any person not an enemy, who claims any right, title or interest in sequestered property of an enemy or to whom any debt is owing from an enemy whose property has been sequestered,

"may file with the said Custodian a notice of his claim under oath \* \* \* and the President, if application is made therefor by the claimant, may, with the assent of the owner of said property \* \* \* order the payment \* \* \* to said claimant of the money \* \* \*. If the President shall not so order within sixty days after the filing of such application, or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may, at any time before the expiration of six months after the end of the war, institute a suit in equity \* \* \* to establish the interest, right, title or debt so claimed, and if suit shall be so instituted, then the money \* \* \* of the enemy \* \* \* shall be retained in the custody of the Alien Property Custodian \* \* \* until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied \* \* \* by the defendant or by the Alien Property Custodian \* \* \* on order of the court, or until final judgment or decree shall be entered against the claimant, or suit otherwise terminated."

Section 8 (a) of the Act provides:

"That any person not an enemy \* \* \* who is a party to any lawful contract with the enemy \* \* \* the terms of which provide for a termination thereof upon notice or for acceleration of maturity on presentation or demand \* \* \* may terminate or mature such contract by notice or presentation or demand served or made on the Alien Property Custodian in accordance with the law and the terms of such instrument or contract \* \* \* and such presentation and demand shall have in all respects the same force and effect as if duly served or made upon the enemy \* \* \* personally."

The plaintiffs argue that the notice of March 25, 1919, under Section 9, was a compliance with the provisions of Section 8 (a).

The argument is an afterthought. In their briefs in the District Court no mention is made of it. We submit, the attempt to fit the notice of claim filed under Section 9 into a demand under Section 8 is as successful as any other attempt to fit a square peg into a round hole.

True, the notice under Section 8 (a) need not follow a set model. But it must state, in language intelligently designed to that effect, that there is a contract or debt which may by its terms be matured by notice or demand and that by the notice filed it is intended to mature it. The notice of March 25, 1919, obviously does not meet the test.

The court below, in discussing the sufficiency of the notice and of the cable of August 6, 1919 (R. 109, fol. 327; R. 110, fol. 328), says (see Opinion, R. 130):

"On this point of demand the evidence compels us to disagree with the court below. Passing the point that no demand was pleaded other than that of December 15, 1921, on the Custodian, it is argued

that plaintiffs did in legal effect make several earlier demands, viz.: in March, 1919, by filing documents with the custodian and in August, 1919, by an interchange of letters and telegrams with both banks (the reference here is to the defendant bank and to Deutsche Bank).

It would serve no useful purpose to recite the lengthy statutory demands of March, 1919; suffice it to say that we are convinced that all these documents related to the property of customers or clients of Zimmermann & Forshay which had either been impounded by the German authorities or lost track of in the fog of silence which had enveloped the Austrian Bank. It is impossible to find in these documents any evidence of a demand for plaintiff's own deposit account.

We are confirmed in this result by observing that as to each bank account, as soon as commercial relations were re-established, plaintiffs expressed the desire to go on with pre-war business and maintain their old deposit accounts; and these desires were expressed after March, 1919."

The notice of December 15, 1921, does not even state that the amount of kronen therein mentioned *is due*. It states merely that the "debt arises from a pre-war balance which claimant had with above mentioned enemy or ally of enemy and which said enemy or ally of enemy *now owes* this claimant," etc. (R. 121, fol. 361). There is not a word in it from which it may be gathered that the plaintiffs desired to mature their bank account. We respectfully submit that the notice filed was obviously not intended to serve the purpose of a demand under Section 8 (a) at the time of filing and that it should not be permitted to serve that purpose as a result of an afterthought.

## D.

It must again be remarked, that in view of this court's decision in the *Humphrey* case, the questions whether or not a demand was made, or an account stated or the contract matured by the war, have become largely academic.

Since the plaintiffs' learned counsel argue these points at great length, we think it proper, even if not altogether necessary, to examine the conclusions at which they have arrived and to show that they are legally unsupportable.

Counsel for plaintiffs contend that the contract between the parties was terminated by the outbreak of the war. In support of this proposition they cite the cases of *New York Life Insurance Co. v. Statham*, 93 U. S. 24, and *Griswold v. Waddington*, 16 Johns. 438 (N. Y.). Both cases fail to support plaintiffs' view.

In the *New York Life Insurance* case, suit was brought on a life insurance policy issued in 1851 on the life of a resident of Mississippi. Premiums were paid until the outbreak of the Civil War. During hostilities, premiums could not be paid. The insured died in 1862. The company claimed a forfeiture. The court said at page 30:

"Promptness of payment is essential in the business of life insurance. All the calculations of the insurance company are based on the hypothesis of prompt payment."

and at page 31, the court said further:

"The case therefore is one in which time is material and of the essence of the contract. Non-payment at the date involves forfeiture if such be the terms of the contract as is the case here. \* \* \* But the Court below bases its decision on the assumption that when performance of the condition becomes illegal in consequence of the prevalence of public war, it is excused and forfeiture does not

ensue. It supposes the contract to have been suspended during the war and to have revived with all its force when the war ended. *Such a suspension and revival do take place in the case of ordinary debts.* But have they ever been known to take place in the case of executory contracts in which time is material?" (Italics ours.)

It thus appears that the *New York Life Insurance* case cited, not only fails to support plaintiffs' contention, but is an authority to the contrary.

The *Griswold* case cited is even more inapplicable. It relates to a contract made by the parties *while their countries were at war with each other.* The Court held that:

"As soon as a war is commenced, all trading, negotiation, communication or intercourse between the citizens of the country and the enemy, without the direct permission of Government, is unlawful. Therefore no valid contract can exist nor any promise arise by implication of law, from any transaction with an enemy."

That is quite a different question than the one involved here.

It is the established law that contracts such as that in suit are not terminated or dissolved by the war—they are *merely suspended.* As stated by the Supreme Court in the case of *New York Life Insurance Company v. Statham* (*supra*):

"Such a suspension and revival do take place in the case of ordinary debts."

In the case of *Lainar v. Micon*, 112 U. S. 454, 464, the Court said:

"A state of war does not put an end to pre-existing obligations \* \* \* but suspends until the return of peace the right of anyone residing in the enemy's country to sue in our Courts."

Again, in the case of *Hangar v. Abbott*, 73 U. S. 536, the Court said :

"We suspend the right of the enemy to the debts which our traders owe him, but we do not annul the right. We preclude him during war from suing to recover his due \* \* \* but with the return of peace we return the right and the remedy."

See also to the same effect,

*Brown v. Hiatts*, 82 U. S. 184.

*Dorsey v. Kyle*, 96 American Decisions 621.

The English cases are in accord with the above views.

In the case of *Janson v. Driefontein* (1902), A. C. 484, Lord Halsbury, the Lord Chancellor said :

"No contract or other transaction with a native of the country which afterwards goes to war, is affected by the war. The remedy is indeed suspended; an alien enemy cannot sue in the Courts of either country while the war lasts; but the rights of the contract are unaffected and when the war is over, the remedy in the Courts of either, is restored."

So held also in the case of *W. L. Ingle, Ltd., v. Mannheim Insurance Co.* (1915), 1 K. B. 227.

Wm. Finlayson Trotter (*The Law of Contract During and After War*, London, 1919, 3rd Ed., p. 59) states :

"The general principle that an alien enemy's rights to the performance of, and right of action in a contract concluded and executed by him before war, are only suspended by the war, applies particularly to contracts which only require for their performance by the other party, the payment of money." (Italics ours.)

The rule is thus stated in *Scott's Effect of War on Contracts*, 2nd Ed., page 28:

"Broadly speaking, I think that ordinary contracts, commercial or other, like sales of goods for future delivery (that is to say, on the cotton or corn markets), charter parties, steamship line conferences or insurance, are dissolved; though the rights of property arising out of them and *already in existence before the war*, such as *debts*, accrued claims for damages return of premiums \* \* \* will be preserved and will be enforceable by action after the war \* \* \* and in those contracts where property is the important thing and the mutual obligations of performance are incidental to the property, when the war is over, the obligations of performance will revive as incidental to the property and thus the whole contract will be merely suspended."

On page 37 of their brief, the plaintiffs' counsel say:

"These plaintiffs, upon the inception and during the existence of the war, were faced by a dilemma. The account was useless to them unless they could communicate with the defendant bank, whereas by attempting to so communicate they must have taken steps violating the rules of international law, of common law and of statute."

That is not correct. It is established that there were no war restrictions imposed in Austria during the war on property of Americans. The evidence is that defendant bank executed pre-war orders of the plaintiffs even after war began. Nor did the Trading with the Enemy Act forbid absolutely communication with an enemy or ally of enemy. It prohibited such communication only *without license* by the President.

The statute says (Sec. 3 (a)):

"That it shall be unlawful for any person in the United States, *except with the license of the President* \* \* \* to trade \* \* \* with an enemy."



Licenses by the President are provided for in Section 5 (a) :

"That the President \* \* \* may grant licenses, special or general, temporary or otherwise, and for such period of time and containing such provisions and conditions as he shall prescribe, to any person or class of persons \* \* \* to perform any act made unlawful without such license in section three hereof, \* \* \*."

And Section 5 (b) seems to have been designed specially to meet the situation the plaintiffs say they found themselves in. It reads :

"That the President may investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, *any transactions in foreign exchange, export or earmarkings of gold or silver coin or bullion or currency, transfers of credit in any form* (other than credits relating solely to transactions to be executed wholly within the United States), *and transfers of evidences of indebtedness* or of the ownership of property between the United States and any foreign country, whether enemy, ally of enemy or otherwise, or between residents of one or more foreign countries, by any person within the United States \* \* \*." (Italics ours.)

By Executive Order of October 12, 1917, the President established a War Trade Board upon which he conferred authority (Executive Order 2729-A)

"To issue, under such terms and conditions as are not inconsistent with law, or to withhold or refuse, licenses to trade whether directly or indirectly, with, to, or from, or for, or on account of, or on behalf of, or for the benefit of, \* \* \* an enemy or ally of enemy."

If the plaintiffs had desired to withdraw their balance they could readily have done so through the licensing machinery established by the Trading with the Enemy Act and the Executive Orders made under it. Since the withdrawal would have resulted in transferring a substantial sum of money from an enemy country to our own, an application for a license to that end would surely have been granted.

It is a just inference from the facts to say that the plaintiffs at no time, before or after the outbreak of war, desired to withdraw their deposit.

The plaintiffs were successful international bankers of long experience. They knew in the beginning of 1917 that our country was at the threshold of war with Germany and her ally, Austria. What the legal effect of war would be on their bank balances in enemy countries they might at least have surmised. When war was declared on Germany on April 6, 1917, all doubt which might have survived in their minds about the future of our relations with Austria must have vanished. They unquestionably knew then that we would not remain at peace with Austria while we were waging war on her ally, Germany. The plaintiffs, *had they desired*, could then have taken steps to withdraw their balance in the defendant bank. *No slightest impediment to such a withdrawal existed between April 6, 1917, and December 7, 1917, when we finally declared war on Austria.* Even after war was declared on Austria, the plaintiffs might have withdrawn their balance had they seen fit to do so, *at least so far as the defendant bank and the Austrian Government were concerned.* It is well known that Austria did not adopt any exceptional war measures or measures of transfer in respect of property of Americans, though property of other allied nationals was not so favored. Nothing prevented the withdrawal by the plaintiffs, *except prohibition*

*imposed by our laws.* These laws, as above shown, did not unconditionally condemn such a withdrawal. They merely required that a license should first be obtained from the President or the War Trade Board.

The plaintiffs' counsel argue (p. 28 of their brief) that their balance in the defendant bank became due at the outbreak of the war, because the contract between the parties was executory and the war having frustrated their intentions to draw against their balance, the contract was dissolved. The argument, we submit, has no merit.

The relation between a bank and its depositor is that of debtor and creditor. That relation has certain well-defined legal aspects. Are these aspects changed by any special purpose or motive the depositor had in entering the relation? It was a matter of indifference to the defendant bank how plaintiffs used their bank balance. They could issue drafts to customers against it; they could direct its transfer in whole or in part, by cable, wireless or otherwise; they could direct credit accounts to be opened in the name of other persons, but the only effect of these transactions on the defendant bank was to substitute other creditors in respect of parts of the balance. It always remained a debtor, with only one duty resting on it—to pay on demand. In what way, then, did this debt differ from any other debt?

The plaintiffs answer this question by saying that:

"The contract is one of deposit in a bank. The relation created between the parties was that of banker and depositor with all of the mutual undertakings and obligations therein involved. To call the relation merely that of debtor and creditor and then, seeing merely the debt, to apply the doctrine of *Hanger v. Abbott*, is to regard only one element of the contract and to disregard the balance of the essential characteristics of the relationship by

which continued mutual duties were created" (p. 29, Plaintiffs' Brief).

They then quote from the stipulation of fact the following "admittedly accurate description" of the nature of the account, presumably to show the "continued mutual duties created":

"For a number of years preceding the outbreak of the war between the United States and Austria, plaintiffs maintained a bank account in kronen with the defendant, the Wiener Bank Verein, in which the plaintiffs from time to time made deposits in kronen for the purpose of providing payment of drafts and orders issued and transmitted by the plaintiffs by letter, cable, wireless or otherwise, and drawn on and payable at the defendant, Wiener Bank Verein, at Vienna."

We submit the proof does not support the allegation. To us the quotation conveys merely that plaintiffs opened a bank account with defendant bank in order to have funds on hand at Vienna for their various purposes. No duty appears to have been assumed by the defendant bank, beyond the duty imposed by law upon every debtor—to repay the debt—with this exception, that while ordinarily a debtor must seek out his creditor, a bank need pay only on demand at its banking house.

When the plaintiffs' counsel complain of the Circuit Court of Appeals because it assumed the relation between the parties to be that of debtor and creditor, they disclose a grievance against every jurisdiction in the United States and in England; for there is not a court here or abroad which considered the question, which has failed to hold that the relation between a depositor and his bank is precisely that between a creditor and his debtor.

Moreover, plaintiffs' counsel seem to be unaware of the implications of their argument.

If they were correct in their view that the contract between them and the defendant bank was dissolved by the war, *they would have no right to recover under it at all.* The only rights they have are predicated upon the theory that since they performed their part of the contract, it was not dissolved by the war, but merely suspended until the advent of peace.

On page 42 of their brief, plaintiffs depart from their original line of argument and base their claim of the maturity of their deposit as of April 6, 1917, upon the ground that the contract had become impossible of performance, and was, for that reason, terminated.

The argument will not stand analysis. For whom did performance become impossible? Not for the defendant bank, surely. As shown above, it was always ready, willing and able to discharge every duty it owed the plaintiffs. There was nothing to prevent. As to the plaintiffs, *they were under no duty to the defendant bank at all.*

## POINT V.

**The equities are not fairly stated in Point VI of the plaintiffs' brief.**

The plaintiffs' counsel begin their analysis of the equities (p. 98 of their brief) with the statement:

"At first glance, it may appear inequitable for the plaintiffs herein to seek to recover at a prewar rate of exchange moneys owing by an Austrian bank in kronen. We respectfully submit, however, that such is not the case."

There is more perspicuity in the "first glance" of the plaintiffs' distinguished counsel than in their subsequent ones. We submit that it would be grossly inequitable to compel defendant bank to pay back kronen received by it in the ordinary course at Vienna before the war in any other currency, regardless of any rate of exchange. It did not agree to maintain the parity of exchange when it accepted the deposit. No bank ever does. When the defendant bank made its court deposit on April 1, 1920, the krone was still worth about two and one-half cents. Had the plaintiffs accepted the offer of the defendant bank, they would have realized about 20 per cent. of the dollar value of their pre-war kronen deposit. No doubt they expected that they would realize more by going to court. Why should the defendant bank be required to underwrite a loss due entirely to plaintiffs' poor judgment? The defendant bank has not profited by the situation. On the contrary, its losses by currency depreciation have been staggering. Being a Vienna bank, its liquid funds were principally kronen, just as the liquid funds of an American bank would be principally dollars. To dispute this obvious fact would be idle. Plaintiffs' counsel say the equities have changed because they seek to enforce their unjust claim against the defendant bank's pre-war dollars seized here by the Alien Property Custodian. This is a curious argument. Possession may be nine points of the law. Not even the adage states it to be nine points in equity. In the defendant bank's depleted coffers kronen always remained kronen. Just as in the case of the lean kine in Pharaoh's dream, the lean kronen took on no flesh after eating the fat ones.

It has never been held in this country that banks are liable to their depositors for more dollars than the number deposited. And yet, our currency has fluctuated in value at times, like that of other countries. The banks

have always paid a dollar for each dollar deposited, no matter when deposited, and no matter what the fluctuations were, upwards or downwards.

To apply the opposite rule would overnight ruin every bank in the country, in the event of a sudden depreciation in our currency. What would happen if all the banks were obliged to pay even \$1.10 for each \$1 deposited? With \$1,000,000 capital and \$10,000,000 deposits, where would a bank be the morning after?

And this court has so held in the case of *Humphrey v. Deutsche Bank (supra)* :

"An obligation in terms of the currency of a country takes the risk of currency fluctuations and whether creditor or debtor profits by the change, the law takes no account of it (citations). Obviously, in fact, a dollar or a mark may have different values at different times, but to the law that establishes it, it is always the same. If the debt had been due here and the value of dollars had dropped before suit was brought, the plaintiff could recover no more dollars on that account. A foreign debtor should be no worse off."

Moreover, in their analysis of the equities, the plaintiffs by no means tell the whole story. They do not tell, for instance, how much of this kronen balance had been sold by them by means of drafts, which have long been outlawed in the hands of the holders. Plaintiffs say on page 98 of their brief :

"Prior to the entry of the United States into war, plaintiffs attempted, as did many other financial houses, to exhaust their deposits of kronen in order that they might not have property in enemy countries in the event that a state of war arose."

The only way plaintiffs had of exhausting their deposits was by sales of kronen exchange. The outbreak of the war found them with a balance of over 3,000,000 kronen. It is more than likely that only a small portion of that balance represented kronen still owned by the plaintiffs. No facts have been furnished by them to negative the likelihood that to allow them to recover at the pre-war rate of exchange would enrich them enormously at the expense of the defendant bank not only, but at the expense of a great many purchasers of drafts, who have no longer recourse against plaintiffs under the law.

### CONCLUSION.

**The decree of the Circuit Court of Appeals should be affirmed.**

Respectfully submitted,

**SAMUEL R. WACHTELL,**  
Solicitor and Counsel for Appellee,  
Wiener Bank Verein.

February, 1927.



## APPENDIX.

### SECTION III.—*Debts.*

#### ARTICLE 248.

There shall be settled through the intervention of Clearing Offices to be established by each of the High Contracting Parties within three months of the notification referred to in paragraph (e) hereafter the following classes of pecuniary obligations:

- (1) Debts payable before the war and due by a national of one of the Contracting Powers, residing within its territory, to a national of an Opposing Power, residing within its territory;
- (2) Debts which became payable during the war to nationals of one Contracting Power residing within its territory and arose out of transactions or contracts with the nationals of an Opposing Power, resident within its territory, of which the total or partial execution was suspended on account of the existence of a state of war;
- (3) Interest which has accrued due before and during the war to a national of one of the Contracting Powers in respect of securities issued or taken over by an Opposing Power, provided that the payment of interest on such securities to the nationals of that Power or to neutrals has not been suspended during the war;
- (4) Capital sums which have become payable before and during the war to nationals of one of the Contracting

Powers in respect of securities issued by one of the Opposing Powers, provided that the payment of such capital sums to nationals of that Power or to neutrals has not been suspended during the war.

In the case of interest or capital sums payable in respect of securities issued or taken over by the former Austro-Hungarian Government the amount to be credited and paid by Austria will be the interest or capital in respect only of the debt for which Austria is liable in accordance with the Financial Clauses of the present Treaty, and the principles laid down by the Reparation Commission.

The proceeds of liquidation of enemy property, rights, and interests mentioned in Section IV and in the Annex thereto will be accounted for through the Clearing Offices, in the currency and at the rate of exchange hereinafter provided in paragraph (d), and disposed of by them under the conditions provided by the said Section and Annex.

The settlements provided for in this Article shall be effected according to the following principles and in accordance with the Annex to this Section:

(a) Each of the High Contracting Parties shall prohibit, as from the coming into force of the present Treaty, both the payment and the acceptance of payment of such debts, and also all communications between the interested parties with regard to the settlement of the said debts otherwise than through the Clearing Offices.

(b) Each of the High Contracting Parties shall be respectively responsible for the payment of such debts due by its nationals, except in the cases where before the war the debtor was in a state of bankruptcy or failure, or had given formal indication of insolvency, or where the debt was due by a company whose business has been liquidated under emergency legislation during the war.

(c) The sums due to the nationals of one of the High Contracting Parties by the nationals of an Opposing State will be debited to the Clearing Office of the country of the debtor, and paid to the creditor by the Clearing Office of the country of the creditor.

(d) Debts shall be paid or credited in the currency of such one of the Allied and Associated Powers, their colonies or protectorates, or the British Dominions or India, as may be concerned. If the debts are payable in some other currency they shall be paid or credited in the currency of the country concerned, whether an Allied or Associated Power, Colony, Protectorate, British Dominion or India, at the pre-war rate of exchange.

For the purpose of this provision the pre-war rate of exchange shall be defined as the average cable transfer rate prevailing in the Allied or Associated country concerned during the month immediately preceding the outbreak of war between the said country concerned and Austria-Hungary.

If a contract provides for a fixed rate of exchange governing the conversion of the currency in which the debt is stated into the currency of the Allied or Associated country concerned, then the above provisions concerning the rate of exchange shall not apply.

In the case of the new States of Poland and the Czechoslovak State the currency in which and the rate of exchange at which debts shall be paid or credited shall be determined by the Reparation Commission provided for in Part VIII, unless they shall have been previously settled by agreement between the States interested.

(e) The provisions of this Article and of the Annex hereto shall not apply as between Austria on the one hand and any one of the Allied and Associated Powers, their colonies or protectorates, or any one of the British Dominions or India on the other hand, unless within a period

of one month from the deposit of the ratification of the present Treaty by the Power in question, or of the ratification on behalf of such Dominion or of India, notice to that effect is given to Austria by the Government of such Allied or Associated Power or of such Dominion or of India as the case may be.

(f) The Allied and Associated Powers which have adopted this Article and the Annex hereto may agree between themselves to apply them to their respective nationals established in their territory so far as regards matters between their nationals and Austrian nationals. In this case the payments made by application of this provision will be subject to arrangements between the Allied and Associated Clearing Offices concerned.

#### ANNEX.

##### 1.

Each of the High Contracting Parties will, within three months from the notification provided for in Article 248, paragraph (e), establish a Clearing Office for the collection and payment of enemy debts.

Local Clearing Offices may be established for any particular portion of the territories of the High Contracting Parties. Such local Clearing Offices may perform all the functions of a central Clearing Office in their respective districts, except that all transactions with the clearing office in the Opposing State must be effected through the central Clearing Office.

##### 2.

In this Annex the pecuniary obligations referred to in the first paragraph of Article 248 are described as "enemy

debts", the persons from whom the same are due as "enemy debtors", the persons to whom they are due as "enemy creditors", the Clearing Office in the country of the creditor is called the "Creditor Clearing Office", and the Clearing Office in the country of the debtor is called the "Debtor Clearing Office".

## 3.

The High Contracting Parties will subject contraventions of paragraph (a) of Article 248 to the same penalties as are at present provided by their legislation for trading with the enemy. They will similarly prohibit within their territory all legal process relating to payment of enemy debts, except in accordance with the provisions of this Annex.

## 4.

The Government guarantee specified in paragraph (b) of Article 248 shall take effect whenever, for any reason, a debt shall not be recoverable, except in a case where at the date of the outbreak of war the debt was barred by the laws of prescription in force in the country of the debtor, or where the debtor was at that time in a state of bankruptcy or failure or had given formal indication of insolvency, or where the debt was due by a company whose business has been liquidated under emergency legislation during the war. In such case the procedure specified by this Annex shall apply to payment of the dividends.

The terms "bankruptcy" and "failure" refer to the application of legislation providing for such juridical conditions. The expression "formal indication of insolvency" bears the same meaning as it has in English law.

## 5.

Creditors shall give notice to the Creditor Clearing Office within six months of its establishment of debts due to them, and shall furnish the Clearing Office with any documents and information required of them.

The High Contracting Parties will take all suitable measures to trace and punish collusion between enemy creditors and debtors. The Clearing Offices will communicate to one another any evidence and information which might help the discovery and punishment of such collusion.

The High Contracting Parties will facilitate as much as possible postal and telegraphic communication at the expense of the parties concerned and through the intervention of the Clearing Offices between debtors and creditors desirous of coming to an agreement as to the amount of their debt.

The Creditor Clearing Office will notify the Debtor Clearing Office of all debts declared to it. The Debtor Clearing Office will, in due course, inform the Creditor Clearing Office which debts are admitted and which debts are contested. In the latter case, the Debtor Clearing Office will give the grounds for the non-admission of debt.

## 6.

When a debt has been admitted, in whole or in part, the Debtor Clearing Office will at once credit the Creditor Clearing Office with the amount admitted, and at the same time notify it of such credit.

## 7.

The debt shall be deemed to be admitted in full and shall be credited forthwith to the Creditor Clearing Office unless within three months from the receipt of the notification or such longer time as may be agreed to by the

Creditor Clearing Office notice has been given by the Debtor Clearing Office that it is not admitted.

## 8.

When the whole or part of a debt is not admitted the two Clearing Offices will examine into the matter jointly and will endeavour to bring the parties to an agreement.

## 9.

The Creditor Clearing Office will pay to the individual creditor the sums credited to it out of the funds placed at its disposal by the Government of its country and in accordance with the conditions fixed by the said Government, retaining any sums considered necessary to cover risks, expenses or commissions.

## 10.

Any person having claimed payment of an enemy debt which is not admitted in whole or in part shall pay to the Clearing Office, by way of fine, interest at 5 per cent. on the part not admitted. Any person having unduly refused to admit the whole or part of a debt claimed from him shall pay, by way of fine, interest at 5 per cent. on the amount with regard to which his refusal shall be disallowed.

Such interest shall run from the date of expiration of the period provided for in paragraph 7 until the date on which the claims shall have been disallowed or the debt paid.

Each Clearing Office shall in so far as it is concerned take steps to collect the fines above provided for, and will be responsible if such fines cannot be collected.

The fines will be credited to the other Clearing Office, which shall retain them as a contribution towards the cost of carrying out the present provisions.

## 11.

The balance between the Clearing Offices shall be struck monthly and the credit balance paid in cash by the debtor State within a week.

Nevertheless, any credit balances which may be due by one or more of the Allied and Associated Powers shall be retained until complete payment shall have been effected of the sums due to the Allied or Associated Powers or their nationals on account of the war.

## 12.

To facilitate discussion between the Clearing Offices each of them shall have a representative at the place where the other is established.

## 13.

Except for special reasons all discussions in regard to claims will, so far as possible, take place at the Debtor Clearing Office.

## 14.

In conformity with Article 248, paragraph (b), the High Contracting Parties are responsible for the payment of the enemy debts owing by their nationals.

The Debtor Clearing Office will therefore credit the Creditor Clearing Office with all debts admitted, even in case of inability to collect them from the individual debtor. The Governments concerned will, nevertheless, invest their respective Clearing Offices with all necessary powers for the recovery of debts which have been admitted.

## 15.

Each Government will defray the expenses of the Clearing Office set up in its territory, including the salaries of the staff.



## 16.

Where the two Clearing Offices are unable to agree whether a debt claimed is due, or in case of a difference between an enemy debtor and an enemy creditor or between the Clearing Offices, the dispute shall either be referred to arbitration if the parties so agree under conditions fixed by agreement between them, or referred to the Mixed Arbitral Tribunal provided for in Section VI hereafter.

At the request of the Creditor Clearing Office the dispute may, however, be submitted to the jurisdiction of the Courts of the place of domicile of the debtor.

## 17.

Recovery of sums found by the Mixed Arbitral Tribunal, the Court, or the Arbitration Tribunal to be due shall be effected through the Clearing Offices as if these sums were debts admitted by the Debtor Clearing Office.

## 18.

Each of the Governments concerned shall appoint an agent who will be responsible for the presentation to the Mixed Arbitral Tribunal of the cases conducted on behalf of its Clearing Office. This agent will exercise a general control over the representatives or counsel employed by its nationals.

Decisions will be arrived at on documentary evidence, but it will be open to the Tribunal to hear the parties in person, or according to their preference by their representatives approved by the two Governments, or by the agent referred to above, who shall be competent to intervene along with the party or to re-open and maintain a claim abandoned by the same.

## 19.

The Clearing Offices concerned will lay before the Mixed Arbitral Tribunal all the information and documents in their possession, so as to enable the Tribunal to decide rapidly on the cases which are brought before it.

## 20.

Where one of the parties concerned appeals against the joint decision of the two Clearing Offices he shall make a deposit against the costs, which deposit shall only be refunded when the first judgment is modified in favour of the appellant and in proportion to the success he may attain, his opponent in case of such a refund being required to pay an equivalent proportion of the costs and expenses. Security accepted by the Tribunal may be substituted for a deposit.

A fee of 5 per cent. of the amount in dispute shall be charged in respect of all cases brought before the Tribunal. This fee shall, unless the Tribunal directs otherwise, be borne by the unsuccessful party. Such fee shall be added to the deposit referred to. It is also independent of the security.

The Tribunal may award to one of the parties a sum in respect of the expenses of the proceedings.

Any sum payable under this paragraph shall be credited to the Clearing Office of the successful party as a separate item.

## 21.

With a view to the rapid settlement of claims, due regard shall be paid in the appointment of all persons connected with the Clearing Offices or with the Mixed Arbitral Tribunal to their knowledge of the language of the other country concerned. Each of the Clearing Offices

will be at liberty to correspond with the other and to forward documents in its own language.

## 22.

Subject to any special agreement to the contrary between the Governments concerned, debts shall carry interest in accordance with the following provisions:

Interest shall not be payable on sums of money due by way of dividend, interest, or other periodical payments which themselves represent interest on capital.

The rate of interest shall be 5 per cent. per annum, except in cases where, by contract, law, or custom, the creditor is entitled to payment of interest at a different rate. In such cases the rate to which he is entitled shall prevail.

Interest shall run from the date of commencement of hostilities (or, if the sum of money to be recovered fell due during the war, from the date at which it fell due) until the sum is credited to the Clearing Office of the creditor.

Sums due by way of interest shall be treated as debts admitted by the Clearing Office and shall be credited to the Creditor Clearing Office in the same way as such debts.

## 23.

Where by decision of the Clearing Offices or the Mixed Arbitral Tribunal a claim is held not to fall within Article 248, the creditor shall be at liberty to prosecute the claim before the Courts or to take such other proceedings as may be open to him.

The presentation of a claim to the Clearing Office suspends the operation of any period of prescription.

## 24.

The High Contracting Parties agree to regard the decisions of the Mixed Arbitral Tribunal as final and conclusive, and to render them binding upon their nationals.

## 25.

In any case where a Creditor Clearing Office declines to notify a claim to the Debtor Clearing Office, or to take any step provided for in this Annex intended to make effective in whole or in part a request of which it has received due notice, the enemy creditor shall be entitled to receive from the Clearing Office a certificate setting out the amount of the claim, and shall then be entitled to prosecute the claim before the courts or to take such other proceedings as may be open to him.

SECTION IV.—*Property, rights and interests.*

## ARTICLE 249.

The question of private property, rights and interests in an enemy country shall be settled according to the principles laid down in this Section and to the provisions of the Annex hereto:

(a) The exceptional war measures and measures of transfer (defined in paragraph 3 of the Annex hereto) taken in the territory of the former Austrian Empire with respect to the property, rights and interests of nationals of Allied or Associated Powers, including companies and associations in which they are interested, when liquidation has not been completed, shall be immediately discontinued or stayed and the property, rights and interests concerned restored to their owners.

(b) Subject to any contrary stipulations which may be provided for in the present Treaty, the Allied and Associated Powers reserve the rights to retain and liquidate all property, rights and interests which belong at the date of the coming into force of the present Treaty to nationals of the former Austrian Empire, or companies controlled by them, and are within the territories, colonies, possessions and protectorates of such Powers (including territories ceded to them by the present Treaty) or are under the control of those Powers.

The liquidation shall be carried out in accordance with the laws of the Allied or Associated State concerned, and the owner shall not be able to dispose of such property, rights or interests nor to subject them to any charge without the consent of that State.

Persons who within six months of the coming into force of the present Treaty show that they have acquired *ipso*

*facto* in accordance with its provisions the nationality of an Allied or Associated Power, including those who under Articles 72 or 76 obtain such nationality with the consent of the competent authorities, or who under Articles 74 or 77 acquire such nationality in virtue of previous rights of citizenship (*pertnienza*) will not be considered as nationals of the former Austrian Empire within the meaning of this paragraph.

(c) The price or the amount of compensation in respect of the exercise of the right referred to in paragraph (b) will be fixed in accordance with the methods of sale or valuation adopted by the laws of the country in which the property has been retained or liquidated.

(d) As between the Allied and Associated Powers and their nationals on the one hand and nationals of the former Austrian Empire on the other hand, as also between Austria on the one hand and the Allied and Associated Powers and their nationals on the other hand, all the exceptional war measures, or measures of transfer, or acts done or to be done in execution of such measures as defined in paragraphs 1 and 3 of the Annex hereto shall be considered as final and binding upon all persons except as regards the reservations laid down in the present Treaty.

(e) The nationals of Allied and Associated Powers shall be entitled to compensation in respect of damage or injury inflicted upon their property, rights or interests, including any company or association in which they are interested, in the territory of the former Austrian Empire, by the application either of the exceptional war measures or measures of transfer mentioned in paragraphs 1 and 3 of the Annex hereto. The claims made in this respect by such nationals shall be investigated, and the total of the compensation shall be determined by the Mixed Arbitral Tribunal provided for in Section VI or by an arbitrator

appointed by that Tribunal. This compensation shall be borne by Austria, and may be charged upon the property of nationals of the former Austrian Empire, or companies controlled by them, as defined in paragraph (b), within the territory or under the control of the claimant's State. This property may be constituted as a pledge for enemy liabilities under the conditions fixed by paragraph 4 of the Annex hereto. The payment of this compensation may be made by the Allied or Associated State, and the amount will be debited to Austria.

(f) Whenever a national of an Allied or Associated Power is entitled to property which has been subjected to a measure of transfer in the territory of the former Austrian Empire and expresses a desire for its restitution, his claim for compensation in accordance with paragraph (e) shall be satisfied by the restitution of the said property if it still exists in specie.

In such case Austria shall take all necessary steps to restore the evicted owner to the possession of his property, free from all encumbrances or burdens with which it may have been charged after the liquidation, and to indemnify all third parties injured by the restitution.

If the restitution provided for in this paragraph cannot be effected, private agreements arranged by the intermediation of the Powers concerned or the Clearing Offices provided for in the Annex to Section III may be made, in order to secure that the national of the Allied or Associated Power may secure compensation for the injury referred to in paragraph (e) by the grant of advantages or equivalents which he agrees to accept in place of the property, rights or interests of which he was deprived.

Through restitution in accordance with this Article, the price or the amount of compensation fixed by the application of paragraph (e) will be reduced by the actual value

of the property restored, account being taken of compensation in respect of loss of use or deterioration.

(g) The rights conferred by paragraph (f) are reserved to owners who are nationals of Allied or Associated Powers within whose territory legislative measures prescribing the general liquidation of enemy property, rights or interests were not applied before the signature of the Armistice.

(h) Except in cases where, by application of paragraph (f), restitutions in specie have been made, the net proceeds of sales of enemy property, rights or interests wherever situated carried out either by virtue of war legislation, or by application of this Article, and in general all cash assets of enemies, other than proceeds of sales of property or cash assets in Allied or Associated countries belonging to persons covered by the last sentence of paragraph (b) above, shall be dealt with as follows:

(1) As regards Powers adopting Section III and the Annex thereto, the said proceeds and cash assets shall be credited to the Power of which the owner is a national, through the Clearing Office established thereunder; any credit balance in favour of Austria resulting therefrom shall be dealt with as provided in Article 189 of Part VIII (Reparation) of the present Treaty.

(2) As regards Powers not adopting Section III and the Annex thereto, the proceeds of the property, rights and interests, and the cash assets, of the nationals of Allied or Associated Powers held by Austria shall be paid immediately to the person entitled thereto or to his Government; the proceeds of the property, rights and interests, and the cash assets, of nationals of the former Austrian Empire, or companies controlled by them, as defined in paragraph (b), received by an Allied or Associated Power



shall be subject to disposal by such Power in accordance with its laws and regulations and may be applied in payment of the claims and debts defined by this Article or paragraph 4 of the Annex hereto. Any such property, rights and interests or proceeds thereof or cash assets not used as above provided may be retained by the said Allied or Associated Power, and if retained, the cash value thereof shall be dealt with as provided in Article 189 of Part VIII (Reparation) of the present Treaty.

(i) Subject to the provisions of Article 267, in the case of liquidations effected in new States, which are signatories of the present Treaty as Allied and Associated Powers, or in States which are not entitled to share in the reparation payments to be made by Austria, the proceeds of liquidations effected by such States shall, subject to the rights of the Reparation Commission under the present Treaty, particularly under Articles 181 (Part VIII) and 211 (Part IX), be paid direct to the owner. If, on the application of that owner, the Mixed Arbitral Tribunal provided for by Section VI of this Part, or an arbitrator appointed by that Tribunal, is satisfied that the conditions of the sale or measures taken by the Government of the State in question outside its general legislation were unfairly prejudicial to the price obtained, they shall have discretion to award to the owner equitable compensation to be paid by that State.

(j) Austria undertakes to compensate her nationals in respect of the sale or retention of their property, rights or interests in Allied or Associated States.

(k) The amount of all taxes or imposts on capital levied or to be levied by Austria on the property, rights and interests of the nationals of the Allied or Associated Powers from November 3, 1918, until three months from the coming into force of the present Treaty, or, in the

case of property, rights or interests which have been subjected to exceptional measures of war, until restitution in accordance with the present Treaty, shall be restored to the owners.

\* \* \* \* \*

#### ANNEX.

##### 1.

In accordance with the provisions of Article 249, paragraph (d), the validity of vesting orders and of orders for the winding up of businesses or companies, and of any other orders, directions, decisions or instructions of any court or any department of the Government of any of the High Contracting Parties made or given, or purporting to be made or given, in pursuance of war legislation with regard to enemy property, rights and interests is confirmed. The interests of all persons shall be regarded as having been effectively dealt with by any order, direction, decision or instruction dealing with property in which they may be interested, whether or not such interests are specifically mentioned in the order, direction, decision, or instruction. No question shall be raised as to the regularity of a transfer of any property, rights or interests dealt with in pursuance of any such order, direction, decision or instruction. Every action taken with regard to any property, business or company, whether as regards its investigation, sequestration, compulsory administration, use, requisition, supervision or winding up, the sale or management of property, rights or interests, the collection or discharge of debts, the payment of costs, charges or expenses, or any other matter whatsoever, in pursuance of orders, directions, decisions or instructions of any court or of any department of the Government of any of the High Contracting Parties, made or given, or purporting

to be made or given, in pursuance of war legislation with regard to enemy property, rights or interests, is confirmed. Provided that the provisions of this paragraph shall not be held to prejudice the titles to property heretofore acquired in good faith and for value and in accordance with the laws of the country in which the property is situated by nationals of the Allied and Associated Powers.

The provisions of this paragraph do not apply to such of the above-mentioned measures as have been taken by the former Austro-Hungarian Government in invaded or occupied territory, nor to such of the above-mentioned measures as have been taken by Austria or the Austrian authorities since November 3, 1918, all of which measures shall be void.

## 2.

No claim or action shall be made or brought against any Allied or Associated Power or against any person acting on behalf of or under the direction of any legal authority or department of the Government of such a Power by Austria or by any Austrian national or by or on behalf of any national of the former Austrian Empire wherever resident in respect of any act or omission with regard to his property, rights or interests during the war or in preparation for the war. Similarly no claim or action shall be made or brought against any person in respect of any act or omission under or in accordance with the exceptional war measures, laws or regulations of any Allied or Associated Power.

## 3.

In Article 249 and this Annex the expression "exceptional war measures" includes measures of all kinds, legislative, administrative, judicial or others, that have been taken or will be taken hereafter with regard to enemy

property, and which have had or will have the effect of removing from the proprietors the power of disposition over their property, though without affecting the ownership, such as measures of supervision, of compulsory administration, and of sequestration; or measures which have had or will have as an object the seizure of, the use of, or the interference with enemy assets, for whatsoever motive, under whatsoever form or in whatsoever place. Acts in the execution of these measures include all detentions, instructions, orders or decrees of Government departments or courts applying these measures to enemy property, as well as acts performed by any person connected with the administration or the supervision of enemy property, such as the payment of debts, the collecting of credits, the payment of any costs, charges or expenses, or the collecting of fees.

Measures of transfer are those which have affected or will affect the ownership of enemy property by transferring it in whole or in part to a person other than the enemy owner, and without his consent, such as measures directing the sale, liquidation, or devolution of ownership in enemy property, or the cancelling of titles or securities.

## 4.

All property, rights and interests of nationals of the former Austrian Empire within the territory of any Allied or Associated Power and the net proceeds of their sale, liquidation or other dealing therewith may be charged by that Allied or Associated Power in the first place with payment of amounts due in respect of claims by the nationals of that Allied or Associated Power with regard to their property, rights and interests, including companies and associations in which they are interested, in territory of the former Austrian Empire, or debts owing to them by Austrian nationals, and with payment of claims growing

out of acts committed by the former Austro-Hungarian Government or by any Austrian authorities since July 28, 1914, and before that Allied or Associated Power entered into the war. The amount of such claims may be assessed by an arbitrator appointed by M. Gustave Ador, if he is willing, or if no such appointment is made by him, by an arbitrator appointed by the Mixed Arbitral Tribunal provided for in Section VI. They may be charged in the second place with payment of the amounts due in respect of claims by the nationals of such Allied or Associated Power with regard to their property, rights and interests in the territory of other enemy Powers, in so far as those claims are otherwise unsatisfied.

## 5.

Notwithstanding the provisions of Article 249, where immediately before the outbreak of war a company incorporated in an Allied or Associated State had rights in common with a company controlled by it and incorporated in Austria to the use of trade-marks in third countries, or enjoyed the use in common with such company of unique means of reproduction of goods or articles for sale in third countries, the former company shall alone have the right to use these trade-marks in third countries to the exclusion of the Austrian company, and these unique means of reproduction shall be handed over to the former company, notwithstanding any action taken under war legislation in force in the Austro-Hungarian Monarchy with regard to the latter company or its business, industrial property or shares. Nevertheless, the former company, if requested, shall deliver to the latter company derivative copies permitting the continuation of reproduction of articles for use within Austrian territory.

## 6.

Up to the time when restitution is carried out in accordance with Article 249, Austria is responsible for the conservation of property, rights and interests of the nationals of Allied or Associated Powers, including companies and associations in which they are interested, that have been subjected by her to exceptional war measures.

## 7.

Within one year from the coming into force of the present Treaty the Allied or Associated Powers will specify the property, rights and interests over which they intend to exercise the right provided in Article 249, paragraph (f).

## 8.

The restitution provided in Article 249 will be carried out by order of the Austrian Government or of the authorities which have been substituted for it. Detailed accounts of the action of administrators shall be furnished to the interested persons by the Austrian authorities upon request, which may be made at any time after the coming into force of the present Treaty.

## 9.

Until completion of the liquidation provided for by Article 249, paragraph (b), the property, rights and interests of the persons referred to in that paragraph will continue to be subject to exceptional war measures that have been or will be taken with regard to them.

## 10.

Austria will, within six months from the coming into force of the present Treaty, deliver to each Allied or Asso-

ciated Power all securities, certificates, deeds, or other documents of title held by its nationals and relating to property, rights or interests situated in the territory of that Allied or Associated Power, including any shares, stock, debentures, debenture stock, or other obligations of any company incorporated in accordance with the laws of that Power.

Austria will at any time on demand of any Allied or Associated Power furnish such information as may be required with regard to the property, rights and interests of Austrian nationals within the territory of such Allied or Associated Power, or with regard to any transactions concerning such property, rights or interests effected since July 1, 1914.

#### 11.

The expression "cash assets" includes all deposits or funds established before or after the existence of a state of war, as well as all assets coming from deposits, revenues, or profits collected by administrators, sequestrators, or others from funds placed on deposit or otherwise, but does not include sums belonging to the Allied or Associated Powers or to their component States, Provinces, or Municipalities.

#### 12.

All investments wheresoever effected with the cash assets of nationals of the High Contracting Parties, including companies and associations in which such nationals were interested, by persons responsible for the administration of enemy properties or having control over such administration, or by order of such persons or of any authority whatsoever, shall be annulled. These cash assets shall be accounted for irrespective of any such investment.

## 13.

Within one month from the coming into force of the present Treaty, or on demand at any time, Austria will deliver to the Allied and Associated Powers all accounts, vouchers, records, documents, and information of any kind which may be within Austrian territory, and which concern the property, rights and interests of the nationals of those Powers, including companies and associations in which they are interested, that have been subjected to an exceptional war measure, or to a measure of transfer either in the territory of the former Austrian Empire or in territory occupied by that Empire or its allies.

The controllers, supervisors, managers, administrators, sequestrators, liquidators, and receivers shall be personally responsible under guarantee of the Austrian Government for the immediate delivery in full of these accounts and documents, and for their accuracy.

## 14.

The provisions of Article 249 and this Annex relating to property, rights and interests in an enemy country, and the proceeds of the liquidation thereof, apply to debts, credits and accounts, Section III regulating only the method of payment.

In the settlement of matters provided for in Article 249 between Austria and the Allied or Associated Powers, their colonies or protectorates, or any one of the British Dominions or India, in respect of any of which a declaration shall not have been made that they adopt Section III, and between their respective nationals, the provisions of Section III respecting the currency in which payment is to be made and the rate of exchange and of interest shall apply unless the Government of the Allied or Associated Power concerned shall within six months of the



coming into force of the present Treaty notify Austria that one or more of the said provisions are not to be applied.

## 15.

The provisions of Article 249 and this Annex apply to industrial, literary and artistic property which has been or will be dealt with in the liquidation of property, rights, interests, companies or businesses under war legislation by the Allied or Associated Powers, or in accordance with the stipulations of Article 249, paragraph (b).

\* \* \* \* \*

SECTION VI.—*Mixed Arbitral Tribunal.*

## ARTICLE 256.

(a) Within three months from the coming into force of the present Treaty, a Mixed Arbitral Tribunal shall be established between each of the Allied and Associated Powers on the one hand and Austria on the other hand. Each such Tribunal shall consist of three members. Each of the Governments concerned shall appoint one of these members. The President shall be chosen by agreement between the two Governments concerned.

In case of failure to reach agreement, the President of the Tribunal and two other persons, either of whom may in case of need take his place, shall be chosen by the Council of the League of Nations, or, until this is set up, by M. Gustave Ador if he is willing. These persons shall be nationals of Powers that have remained neutral during the war.

If in case there is a vacancy a Government does not proceed within a period of one month to appoint as provided above a member of the Tribunal, such member shall

be chosen by the other Government from the two persons mentioned above other than the President.

The decision of the majority of the members of the Tribunal shall be the decision of the Tribunal.

(b) The Mixed Arbitral Tribunals established pursuant to paragraph (a) shall decide all questions within their competence under Sections III, IV, V and VII.

In addition, all questions, whatsoever their nature, relating to contracts concluded before the coming into force of the present Treaty between nationals of the Allied and Associated Powers and Austrian nationals shall be decided by the Mixed Arbitral Tribunal, always excepting questions which, under the laws of the Allied, Associated or Neutral Powers, are within the jurisdiction of the National Courts of those Powers. Such questions shall be decided by the National Courts in question, to the exclusion of the Mixed Arbitral Tribunal. The party who is a national of an Allied or Associated Power may nevertheless bring the case before the Mixed Arbitral Tribunal if this is not prohibited by the laws of his country.

(c) If the number of cases justifies it, additional members shall be appointed and each Mixed Arbitral Tribunal shall sit in divisions. Each of these divisions will be constituted as above.

(d) Each Mixed Arbitral Tribunal will settle its own procedure except in so far as it is provided in the following Annex, and is empowered to award the sums to be paid by the loser in respect of the costs and expenses of the proceedings.

(e) Each Government will pay the remunerations of the member of the Mixed Arbitral Tribunal appointed by it and of any agent whom it may appoint to represent it before the Tribunal. The remuneration of the President will be determined by special agreement between the Gov-

ernments concerned; and this remuneration and the joint expenses of each Tribunal will be paid by the two Governments in equal moieties.

(f) The High Contracting Parties agree that their courts and authorities shall render to the Mixed Arbitral Tribunals direct all the assistance in their power, particularly as regards transmitting notices and collecting evidence.

(g) The High Contracting Parties agree to regard the decisions of the Mixed Arbitral Tribunal as final and conclusive, and to render them binding upon their nationals.

#### ANNEX.

##### 1.

Should one of the members of the Tribunal either die, retire, or be unable for any reason whatever to discharge his functions, the same procedure will be followed for filling the vacancy as was followed for appointing him.

##### 2.

The Tribunal may adopt such rules of procedure as shall be in accordance with justice and equity and decide the order and time at which each party must conclude its arguments, and may arrange all formalities required for dealing with the evidence.

##### 3.

The agent and counsel of the parties on each side are authorized to present orally and in writing to the Tribunal arguments in support or in defence of each case.

## 4.

The Tribunal shall keep record of the questions and cases submitted and the proceedings hereon, with the dates of such proceedings.

## 5.

Each of the Powers concerned may appoint a secretary. These secretaries shall act together as joint secretaries of the Tribunal and shall be subject to its direction. The tribunal may appoint and employ any other necessary officer or officers to assist in the performance of its duties.

## 6.

The Tribunal shall decide all questions and matters submitted upon such evidence and information as may be furnished by the parties concerned.

## 7.

The High Contracting Parties agree to give the Tribunal all facilities and information required by it for carrying out its investigations.

## 8.

The language in which the proceedings shall be conducted shall, unless otherwise agreed, be English, French, Italian or Japanese, as may be determined by the Allied or Associated Power concerned.

## 9.

The place and time for the meetings of each Tribunal shall be determined by the President of the Tribunal.

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NO. 101

# THE UNITED STATES OF AMERICA

## DEPARTMENT OF AGRICULTURE

OFFICE OF THE SECRETARY  
WASHINGTON, D. C.

REPORT OF THE SECRETARY  
OF AGRICULTURE  
FOR THE YEAR 1916

AND  
OF THE SECRETARY  
OF THE INTERIOR

FOR THE YEAR 1916

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# In the Supreme Court of the United States

OCTOBER TERM, 1926

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No. 180

LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H.  
Hauser, John S. Scully, et al., etc., Appellants

v.

HOWARD SUTHERLAND, AS ALIEN PROPERTY CUS-  
todian; Frank White, as Treasurer of the United  
States; and the Wiener Bank-Verein of Vienna,  
Austria

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*APPEAL FROM THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE SECOND CIRCUIT*

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**BRIEF ON BEHALF OF HOWARD SUTHERLAND AS ALIEN  
PROPERTY CUSTODIAN, AND FRANK WHITE, AS TREAS-  
URER OF THE UNITED STATES**

---

## OPINIONS BELOW

The opinion of the Circuit Court of Appeals  
(R. 127) is reported in 7 F. (2d) 443. The opinion  
of the District Court (R. 57) is reported in 2 F.  
(2d) 629.



**JURISDICTION**

The judgment of the Circuit Court of Appeals was entered on May 11, 1925. (R. 132.)

The appeal to this Court has been prosecuted pursuant to Section 241 of the Judicial Code (c. 231, 36 Stat. 1157).

**QUESTIONS PRESENTED**

There are four substantial questions presented by the record for the determination of this Court:

(1) Whether an obligation of an Austrian bank to pay in Austria to a customer the balance of a general deposit account is discharged by compliance with an Austrian statute, which provides for the payment of a debt by a prescribed deposit in court, in the circumstances involved in this proceeding.

(2) Assuming that the statutory deposit did not have this effect, was this obligation matured by the outbreak of war between the United States and Austria, or by the provisions of the Trading with the Enemy Act, or by any demand for payment made by the appellants upon the bank so as to support the suit herein?

(3) Assuming that the obligation has not been discharged by the operation of the Austrian statute, and has been matured by one of these methods, as of what time shall the rate of exchange be fixed for the purpose of making the necessary translation from the Austrian currency (kronen) in which the debt was payable in Austria, to its equivalent in

value in American dollars in which the judgment will be payable;

(4) Are any of the provisions of the Treaty of Vienna between the United States and Austria (42 Stat. 1946) applicable to the situation involved herein?

#### STATEMENT OF THE CASE

The appellants instituted the present suit under the provisions of Subsection (a) of Section 9 of the Trading with the Enemy Act (c. 241, 41 Stat. 977) to recover the amount of its bank balance with the Wiener Bank Verein from money of this institution seized under the Act and covered into the Treasury of the United States.

For a number of years prior to the outbreak of the war on December 7, 1917, between the United States and Austria, the appellants were depositors in the Wiener Bank Verein. (R. 36.) On April 6, 1917, the appellants had a balance of 2,063,799.03 kronen, standing to their credit after the deduction of certain setoffs. (R. 19.) The appellants seek to recover the equivalent in United States currency, at the average cable transfer rate of exchange between United States dollars and Austrian kronen prevailing in the United States during the month immediately preceding the outbreak of war between the United States and Austria, namely, 11.18 United States cents for each Austrian krone. (R. 37, 47.)

No demand to close out the account was ever made by appellants prior to the beginning of the

war with Austria. (R. 101.) During the hostilities the bank made certain payments to the appellants' account (R. 108), and upon the resumption of communication after the war business dealings were continued.

On April 1, 1920, the bank deposited in the appropriate court the number of kronen standing to the credit of the appellants on April 6, 1917 (R. 37), in compliance with Section 1425 of the General Civil Code of Austria, which provides as follows (R. 37):

If a debt cannot be paid because the creditor is unknown, absent, or dissatisfied with the offer, or because of other important reasons, the debtor may deposit in court the subject matter in dispute; or, if it is not susceptible of such action he may take legal steps for its custody. If legally carried out and the creditor has been informed thereof, either of these measures discharges the debtor of his obligation, and places the subject matter delivered at the risk of the creditor.

On December 15, 1921, the appellants "filed with the Alien Property Custodian a notice of their claim on said debt under oath and in such form and containing such particulars as the said Custodian required, and have not filed an application to the President of the United States for the allowance of said claim, all in pursuance of the provisions of the Trading with the Enemy Act and the

amendments thereto" (R. 16, 24), and on or about February 10, 1922, instituted the present proceedings. (R. 18.)

The District Court held that the deposit of the money into court as provided in the foregoing section of the Austrian Civil Code, was ineffective to discharge the obligation (R. 64), and further held (R. 64) that the following cable, sent by the appellants to the bank on August 12, 1919 (R. 62), or August 15, 1919 (R. 109), constituted a sufficient demand to mature the obligation (R. 109, 110):

Referring to our old balance will you consent to American Alien Property Custodian paying us out of your former funds in his custody equivalent in dollars at March fifteenth nineteen seventeen rate of eleven eighteen stop if you agree wire us to that effect and we will send you necessary papers to be filled out and signed by you stop this will obviate lawsuit which we otherwise be compelled to institute.

As a consequence the court decided that—

Plaintiffs may have a decree for the value of their deposit in dollars calculated at the rate of exchange prevailing as between kronen and dollars upon August 12, 1919, with interest from that date. (R. 65.)

This amounted to \$50,919.97 with interest aggregating \$14,766.80. (R. 68.)

From this decree the present appellees appealed to the Circuit Court of Appeals for the Second Circuit where it was held that the foregoing cable

did not constitute a demand for the payment of the balance on deposit, and that no demand had been made prior to April 1, 1920, and that there having arisen "a difference of opinion as to the rate at which plaintiffs' old account would be available for exchange" (R. 132), and the jural relations of the parties being subject to the Austrian law (R. 129) "payment into Court of all the kronen due was a complete extinguishment of plaintiffs' demand on the Wiener Bank." (R. 132.) The decree below was thereupon reversed and the court below directed to dismiss the bill.

#### SUMMARY OF ARGUMENT

(1) The obligations assumed by the bank to its depositors involved performances in Austria. Consequently, on familiar principles, the question as to what constitutes promissory compliance must be determined by a reference to the provisions of the Austrian law.

Furthermore, the contract between the parties expressly so provided. (R. 42.) An Austrian statute provided for the satisfaction of a debt, by a payment into court where "the creditor is \* \* \* dissatisfied with the offer, or because of other important reasons." Such a situation existed by reason of the sharp differences of opinion over the matter of the applicable rate of exchange, and in compliance with the statute the bank paid the balance standing to the credit of the appellants into court in the currency of the forum, and gave the

prescribed notice thereof. As a consequence, therefore, the obligations of the bank were discharged. Hence there are no subsisting rights which can be enforced in an American tribunal.

(2) The declaration of war on December 7, 1917, was suspensory in its operation and did not constitute the equivalent of a demand for payment. It is doubtful if the provisions of the Trading with the Enemy Act, Sections 8 (a) and 9 (a), contemplate the payment of debts owing to nonenemies out of seized property, unless due at the time of the institution of suit. There was no sufficient demand by the appellants upon the bank for the payment of the balance. It is submitted, therefore, that the obligation of the bank had not been matured so as to warrant the institution of suit.

(3) Assuming, however, that the invocation of the Austrian statute did not operate as argued above, and assuming further that the obligation of the Austrian Bank to pay the deposit balance had been matured, the appellants are only entitled to recover that number of dollars which would be the equivalent in value of Austrian kronen at their exchange value at the date of the institution of this suit, which was in February, 1922. The record does not give this exchange data, but doubtless it can be agreed upon as a matter of common knowledge.

(4) The Treaty of Peace between Austria and the United States (42 Stat. 1946), proclaimed November 17, 1921, is inapplicable to the circum-

stances of the case, and its provisions entirely immaterial to the determination of any question arising herein.

#### ARGUMENT

#### I

THE PAYMENT INTO COURT PURSUANT TO AUSTRIAN LAW OF THE NUMBER OF AUSTRIAN KRONEN STANDING TO THE CREDIT OF THE APPELLANTS OPERATED TO DISCHARGE ALL THE OBLIGATIONS OF THE FORMER

(a) The question of what constituted performance of the duties of the bank to its depositors or its legal equivalent is to be determined by the law of the place of performance.

As the court below said, the jural relationship between the parties "was admittedly that of depositor and banker, and there is no evidence that the nature of that common relation is not the same under \* \* \* Austrian and American law" (R. 129). The contract on behalf of the bank was to pay on demand and at its banking establishment. This was in Vienna. Therefore, any question as to what constituted performance, by original definition or statutory substitution, must be referred for solution to the law of Austria.

The foregoing follows from principles long familiar in judicial utterance.

*Hall v. Cordell*, 142 U. S. 116.

*Pritchard v. Norton*, 106 U. S. 124.

*Andrews v. Pond*, 13 Pet. 65.

*Story, Conflict of Laws*, 8th ed., Sec. 280.

*Dicey, Conflict of Laws*, 3rd ed., pp. 609, 610.

Furthermore, the parties have expressly stipulated, among else, that

The relations existing between us and our business friends will in general be governed by the laws in force in Austria. So far as transactions with our main office come into consideration, the City of Vienna is to be considered the place where payment is to be made or where obligations are to be met as the case may be. (R. 42, 43.)

No good reason suggests itself why the wishes of the contracting parties in this respect should not be given the effect desired.

(b) Section 1425 of the General Civil Law Code of Austria, passed prior to the beginning of relations herein, and in force at the time of its invocation, provided so far as material (R. 37):

If a debt can not be paid because the creditor is \* \* \* dissatisfied with the offer, or because of other important reasons, the debtor may deposit in court the subject matter in dispute \* \* \*. If legally carried out and the creditor has been informed thereof, either of these measures discharges the debtor of his obligation and places the subject matter delivered at the risk of the creditor.

A situation such as contemplated by the law had developed in a dispute over the determination of the controlling date for dealing with the pertinent question of international exchange, a consideration of paramount importance on the question as to the



amount of the recovery. It is apparent, that under the circumstances, the debt could not be paid for at least one, and possibly two, of the reasons assigned in the statute. It is, therefore, applicable to the case.

On or about April 1, 1920 (R. 37), the Weiner Bank Verein made the statutory deposit of the entire balance standing to the credit of the appellants in the legal currency of the forum—Austrian kronen, of course—and the notice prescribed in the statute was given (R. 38).

It follows, therefore, that the bank thereupon acquired a statutory discharge of its obligations in the premises, and the appellants' rights were doubtless transferred to a claim against the funds *in custodia legis*.

## II

ASSUMING THAT THE STATUTORY DEPOSIT DID NOT HAVE THE EFFECT CONTENTED FOR HEREIN, WAS THE OBLIGATION TO PAY APPELLANTS' BANK BALANCE MATURED SO THAT THE PROCEEDINGS HEREIN ARE MAINTAINABLE?

It is familiar learning that as a general rule no suit may be maintained against a bank for the recovery of a deposit balance until the depositor has made a demand therefor and been refused.

*Leather Manufacturers' Bank v. Merchants' Bank*, 128 U. S. 26 at page 34.

*Payne v. Gardiner*, 29 N. Y. 146 at 168.

*Koelzer v. First National Bank*, 125 Wis. 595.

*Smiley v. Fry*, 100 N. Y. 262.

A claim to recover an amount on deposit in an enemy bank out of funds of the bank seized under the Trading with the Enemy Act would seem to stand on no different footing.

Appellants seek to avoid the consequences of the general rule by arguing that the provisions of Section 9 (a) permit the recovery out of funds seized under the Trading with the Enemy Act of a debt that was owing on October 6, 1917, regardless of whether the debt was due on that date. Sections 9 (a) and 9 (e) (c. 241, 41 Stat. 977, 978, 980) provide, so far as material to this consideration, as follows:

(a) That any person not an enemy or ally of enemy \* \* \* to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed \* \* \* or paid to the Alien Property Custodian \* \* \*, and held by him or by the Treasurer of the United States \* \* \* may \* \* \* institute a suit in equity \* \* \* in the district court of the United States for the district in which such claimant resides \* \* \* to *establish* the \* \* \* debt so claimed, and *if so established* the court shall order the payment \* \* \* to said claimant \* \* \*. (Italics ours.)

(e) \* \* \* nor in any event shall a debt be allowed under this section unless it

was owing to and owned by the claimant prior to October 6, 1917 \* \* \*.

The provisions of the statute bar the recovery of a debt that was not *owing* prior to October 6, 1917. It does not follow that the statute permits the collection of debts which were owing to enemies before the war but not due. The statute provides for suit to "establish" the debt and "if so established" directs the payment out of the property. This clearly implies that the debt must be one for which a suit could have been brought against the enemy. For example, if appellants' argument is sound, an American citizen holding a bond upon which an enemy was an obligor but which was payable 50 years after date, could secure payment of the bond immediately out of the enemy's property seized under the Trading with the Enemy Act. It would be impossible, however, under such circumstances, for the Court to establish a debt against the enemy since the establishment of a debt implies an ascertainment of an obligation to pay.

Further Congress has dealt expressly with the situation presented in this case in Section 8 (a) of the Trading with the Enemy Act (c. 106, 40 Stat. 411, 418). This section provides in part:

\* \* \* any person not an enemy or ally of enemy who is a party to any lawful contract with an enemy or ally of enemy, the terms of which provide for termination thereof upon notice or for *acceleration of maturity* on presentation or demand,

\* \* \* may terminate or mature such contract by notice or presentation or demand served or made on the alien property custodian in accordance with the law and the terms of such instrument or contract and under such rules and regulations as the President shall prescribe \* \* \*. (Italics ours.)

If the views presented by the appellants are correct, then this section is entirely superfluous.

Appellants' next contention is that an account was stated as of April 6, 1917, by the letter written by the Austrian bank to appellants on April 1, 1920 (R. 108 ff.). The contents of this letter negative any idea of an intention on the part of the Austrian bank to state an account in the technical sense of the word, and this is emphasized by the following extract from the letter (R. 108-109):

\* \* \* there was at no time during the war or afterwards a prohibition in Austria to effect payments on behalf of Americans out of the balances kept here, and for instance, as you will have noticed from our correspondence, we never discontinued our payments to Mr. Martin Teschner, in whose favour a monthly credit had been opened by your radio of September 18th 1916.

In consequence hereof we effected, as a rule, during the whole war any payments for our American clients which had been ordered to us, and when in April 1919 postal relations were resumed, we continued the accounts kept with us without making

any distinction between pre-war balances and new balances.

Contrary to showing an intention to state an account the letter clearly indicates the insistence of the bank that the relations between the parties had continued even during the war.

Appellants further insist, on the basis of an elaborate discussion, that the outbreak of war automatically terminated the contract and, since they seek a judicial remedy, that new rights were necessarily created in lieu thereof. It would serve no useful purpose to discuss in detail the numerous subsidiary points evolved, nor the authorities considered. We are unable to agree that the principles invoked are relevant, or that the cases cited are applicable or controlling. The appellants have not succeeded in escaping in any wise from the obvious fact that the relation of the parties is simply that of debtor and creditor, the normal situation where one deposits money in a bank (furnishes an executed consideration), and the latter agrees to pay it back on demand at one time or in various installments, according to business usage. The obligation of the bank in such a case consists of a unilateral promise.

War operates to suspend the performance of the promissory undertaking, though if the obligation runs to an enemy, doubtless it may be sequestered or confiscated. If the war terminated the unilateral obligation, as the appellants assert, they would be promptly out of court altogether. If there were

no assets of the promissor in the United States, the remedy would revive upon the cessation of hostilities, provided, of course, the substantive rights were not affected by confiscatory legislation. In our case, since assets of the enemy obligor are within the country, the debt may be liquidated to the extent thereof by legislative privilege.

The character of the substantive foundation of the proceedings, however, remains unchanged. There has been no extinguishment of any contractual duties and no creation of new obligations. The creditor, however, has been given an additional remedy. It is our submission, therefore, that the contract in question consists of a unilateral promise which was not discharged by the outbreak of war, but upon which all remedies were suspended until Congress enabled the creditor to reach domestic assets of the debtor.

*Sutherland v. Mayer*, 271 U. S. 272.

*Hanger v. Abbott*, 6 Wall. 532.

Nor does the alleged notice of claim filed with the Custodian on March 19, 1919 (R. 49-56) constitute a notice for the purpose of maturing the obligation of the bank under Section 8(a) of the Trading with the Enemy Act, *supra*. On its face, this is a notice of claim under Section 9 of the Act, filed as a condition precedent to securing a payment of an obligation thereunder. The provisions of Section 8(a) provide for filing of notice to accelerate the maturity of an obligation. The notice of March 19, 1919, does not purport to be such a notice.

Neither does the cablegram of August 12, 1919 (R. 62, 109), sent by the appellants to the bank in any sense constitute a demand for payment.

It is conceded by the appellants that there was no actual demand prior to the war upon the bank for the payment of the deposit balance (R. 101), and from the foregoing it is clear that there can not be spelled out of the facts any theory upon which it can be said that on April 6, 1917, there was immediately due and payable to the plaintiffs any money from the bank.

Under no theory, therefore, can it be said that there was at the time this action was instituted a debt which had been fully matured and was subject to immediate suit.

### III

IF THE APPELLANTS ARE ENTITLED TO RECOVER HEREIN, THE AWARD MUST BE LIMITED TO THE EQUIVALENT IN DOLLARS OF THE NUMBER OF KRONEN INVOLVED AT THE RATE OF EXCHANGE PREVAILING ON THE DAY THE PROCEEDINGS WERE BEGUN

As the obligation incurred by the bank was to repay the money on demand in Austria in kronen, the case is governed by the decision of this Court in *Die Deutsche Bank Filiale v. Humphrey*, No. 224, Oct. Term, 1926 (decided November 23, 1926, 47 Sup. Ct. Rep. 166), fixing the commencement of the suit as the controlling time.

The action was commenced some time in February, 1922, apparently between the date of the veri-

fication of the bill on February 10, 1922 (R. 18), and the date of the issuance of the subpoena on February 28, 1922. (R. 1.) Just what the prevailing exchange was at the time is not disclosed by the record. It will necessarily be a matter to be established after remand, though as the matter is one easily determined it can very readily be disposed of on stipulation.

The case at bar is distinguishable from the case of *Hicks v. Guinness*, 269 U. S. 71, in that the obligation for which suit was brought in the *Guinness case* was payable in the United States.

In an elaborate effort to avoid the controlling effect of the *Humphrey case*, appellants attempt to evolve the following distinction (Brief, p. 24):

It therefore appears that the only ground of distinction between these cases is that in the *Guinness case* the situs of the plaintiffs, at the time the debt became due, was the United States, whereas, in the *Humphrey case* the situs of the plaintiff, at the time the debt became due, was Germany.

The question of residence is not of the slightest consequence except as material to the inquiry as to where the promise was to be performed. In our case it appears that performance was to be in Austria, and all discussion as to the residence or domicile of the creditors is wide the mark.



## IV

THE FACTS HEREIN DO NOT FALL WITHIN ANY OF THE PROVISIONS OF THE TREATY OF VIENNA BETWEEN THE UNITED STATES AND AUSTRIA OF AUGUST 24, 1921

The appellants submit that under the Treaty they are entitled to have the benefit of the pre-war rate of exchange for United States dollars and Austrian kronen. No question is made of the validity of the Treaty or any of its provisions. We confine ours exclusively to a denial of its applicability.

Article II of the Treaty of Vienna (42 Stat. 1946, 1948) provides:

With a view to defining more particularly the obligations of Austria under the foregoing Article with respect to certain provisions in the Treaty of St. Germain-en-Laye, it is understood and agreed between the High Contracting Parties:

(1) That the rights and advantages stipulated in that Treaty for the benefit of the United States which it is intended the United States shall have and enjoy, are those defined in Parts V, VI, VIII, IX, X, XI, XII and XIV.

The question resolves itself then into an inquiry as to the scope of the advantages conferred on an American national in the situation of the appellants.

Appellants first direct our attention to Part X entitled "Economic Clauses" and particularly to Articles 248, 249, and 250 of Section IV of said Treaty of St. Germain-en-Laye. (Treaties, Conventions, etc., between the United States of America

and Other Powers, Senate Document No. 348, 67th Congress, 4th Session, p. 3149 ff.)

Subsection h(2) of Article 249 of the Treaty of St. Germain provides (p. 3244):

As regards Powers not adopting Section III and the Annex thereto, the proceeds of the property, rights and interests, and the cash assets, of the nationals of Allied or Associated Powers held by Austria shall be paid immediately to the person entitled thereto or to his Government; the proceeds of the property, rights and interests, and the cash assets of nationals of the former Austrian Empire, or companies controlled by them, as defined in paragraph (b), received by an Allied or Associated Power shall be subject to disposal by such Power in accordance with its laws and regulations and may be applied in payment of the claims and debts defined by this Article or paragraph 4 of the Annex hereto. Any such property, rights and interests or proceeds thereof or cash assets not used as above provided may be retained by the said Allied or Associated Power, and, if retained, the cash value thereof shall be dealt with as provided in Article 189, Part VIII (Reparation), of the present Treaty.

The United States did not adopt Section III and the annex thereto, referred to in this provision.

Paragraph 4 of the Annex to Section IV, which contains Article 249, provides (p. 3247):

All property, rights and interests of nationals of the former Austrian Empire within the territory of any Allied or Asso-

ciated Power and the net proceeds of their sale, liquidation or other dealing therewith may be charged by that Allied or Associated Power in the first place with payment of amounts due in respect of claims by the nationals of that Allied or Associated Power with regard to their property, rights and interests, including companies and associations in which they are interested, in territory of the former Austrian Empire, or debts owing to them by Austrian nationals, and with payment of claims growing out of acts committed by the former Austro-Hungarian Government or by any Austrian authorities since July 28, 1914, and before that Allied or Associated Power entered into the war. The amount of such claims may be assessed by an arbitrator appointed by M. Gustave Ador, if he is willing, or if no such appointment is made by him, by an arbitrator appointed by the Mixed Arbitral Tribunal provided for in Section VI. They may be charged in the second place with payment of the amounts due in respect of claims by the nationals of such Allied or Associated Power with regard to their property, rights and interests in the territory of other enemy Powers, in so far as those claims are otherwise unsatisfied.

Paragraph 14 of the annex to Section IV, which contains Article 249, provides (p. 3248) :

The provisions of Article 249 and the Annex relating to property, rights and interests in an enemy country, and the proceeds of the liquidation thereof, apply to

debts, credits and accounts, Section III regulating only the method of payment.

In the settlement of matters provided for in Article 249 between Austria and the Allied or Associated Powers, their colonies or protectorates, or any one of the British Dominions or India, in respect of any of which a declaration shall not have been made that they adopt Section III, and between their respective nationals, the provisions of Section III respecting the currency in which payment is to be made and the rate of exchange and of interest shall apply unless the Government of the Allied or Associated Power concerned shall within six months of the coming into force of the present Treaty notify Austria that one or more of the said provisions are not to be applied.

Subsection (d) of Article 248 of Section III of the Treaty of St. Germain makes provision for the payment of debts, etc., providing as follows:

Debts shall be paid or credited in the currency of such one of the Allied and Associated Powers, their colonies or protectorates, or the British Dominions or India, as may be concerned. If the debts are payable in some other currency, they shall be paid or credited in the currency of the country concerned, whether an Allied or Associated Power, Colony, Protectorate, British Dominion, or India, at the pre-war rate of exchange.

For the purpose of this provision, the pre-war rate of exchange shall be defined as the

average cable transfer rate prevailing in the Allied or Associated country concerned during the month immediately preceding the outbreak of war between the said country concerned and Austria-Hungary.

If a contract provides for a fixed rate of exchange governing the conversion of the currency in which the debt is stated into the currency of the Allied or Associated country concerned, then the above provisions concerning the rate of exchange shall not apply.

In the case of the new States of Poland and the Czecho-Slovak State, the currency in which and the rate of exchange at which debts shall be paid or credited shall be determined by the Reparation Commission provided for in Part VIII, unless they shall have been previously settled by agreement between the States interested.

It is the contention of appellants that the obligation which they are seeking here to collect out of the money of the Austrian bank, which was seized by the Custodian, falls within the foregoing provisions of the Treaty of St. Germain-en-Laye, which is a part of the Treaty between the United States and Austria, and that the rate of exchange provided with respect to debts referred to in the Treaty is applicable to the appellants' debt against the Austrian bank.

It is submitted that a debt claimed under Section 9 of the Trading with the Enemy Act is not embraced within the provisions of this Treaty. It is probable from the provisions of paragraph 4 of

the Annex to Article 249 that the debts for which provision is there made were debts which were to be settled by arbitration before a named arbitrator or before the Mixed Arbitral Tribunal provided for in Section VI of the Treaty. It is apparent from the provisions of the body of the Treaty between the United States and Austria that that Treaty incorporated certain provisions of the Joint Resolution of Congress of July 2, 1921, c. 40, 42 Stat. 105, which brought the war to an end. Section 5 of this Joint Resolution, in so far as applicable, provides (42 Stat. 106):

All property of the \* \* \* Imperial and Royal Austro-Hungarian Government, or its successor or successors, and of all Austro-Hungarian nationals which was on December 7, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or any of its officers, agents, or employees, from any source or by any agency whatsoever, shall be retained by the United States of America and no disposition thereof made, except as shall have been heretofore or specifically hereafter shall be provided by law until such time as \* \* \* the Imperial and Royal Austro-Hungarian Government, or their successor or successors, shall have \* \* \* made suitable provision for the satisfaction of all claims against said Government \* \* \*, of all persons, wheresoever domiciled, who owe permanent allegiance to the United

States of America and who have suffered, through the acts of the \* \* \* Imperial and Royal Austro-Hungarian Government, or its agents, since July 31, 1914 \* \* \*.

This provision of the Treaty, in conjunction with the permissive character of the provisions of the Treaty of St. Germain incorporated therein, indicates that the Treaty simply permitted the United States to avail itself of enemy property to satisfy claims of American citizens of every kind, class, and character. There has been no legislation which purports to be an acceptance by the United States of the permission granted by these provisions of the Treaty. Certainly Section 9 (a) of the Trading with the Enemy Act can not be said to be such legislation, since Section 9 (a), in substantially the same form as it now exists, was enacted on October 6, 1917, the very beginning of the war.

Furthermore, the specific provisions of Subsection h (2) of Article 249, *supra*, upon which the claimants rely, provide in the last sentence that any property not used as provided for therein, that is, amongst other things, not used to satisfy debts of which the appellants claim theirs is one, may be retained by the Allied or Associated Powers, and if retained, "the cash value thereof *shall* be dealt with as provided for in Article 189" of the Treaty of St. Germain, which is also part of the Treaty between the United States and Austria. Article 189 provides (Treaties, Conventions, etc., p. 3205):

The following shall be reckoned as credits to Austria in respect of her reparation obligations:

(a) any final balance in favour of Austria under Sections III and IV of Part X (Economic Clauses) of the present Treaty;

(b) amounts due to Austria in respect of transfers provided for in Part IX (Financial Clauses) and in Part XII (Ports, Waterways, and Railways);

(c) all amounts which, in the judgment of the Reparation Commission, should be credited to Austria on account of any other transfers under the present Treaty of property, rights, concessions or other interests.

In no case, however, shall credit be given for property restored in accordance with Article 184.

If appellants' contention is sound, after debts against the Austrian bank have been paid pursuant to Section 9 (a) of the Trading with the Enemy Act, the United States must pay the cash value of whatever property of the Austrian bank it has in its possession to the credit of Austria in respect of her reparations obligations. This certainly reduces appellants' argument as to the provisions of the Treaty of St. Germain-en-Laye to an absurdity, since the Trading with the Enemy Act specifically provides in Section 12 (c. 106, 40 Stat. 411, 424):

After the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the



Alien Property Custodian or deposited in the United States Treasury, shall be settled as Congress shall direct \* \* \*.

With minor exceptions, which are not material here, Congress has made no provision for the disposition of enemy property in the possession of the Custodian or in the Treasury of the United States.

In the case of *Hicks v. Guinness*, 269 U. S. 71, precisely the same arguments were urged on behalf of the claimants as to those provisions of the Treaty of Versailles which were incorporated in the Treaty between the United States and Germany, identical with the provisions quoted above from the Treaty of St. Germain.

This Court, however, in dealing with circumstances similar to those involved herein, except that the debt had matured prior to the war and the debt was payable in the United States, held that the decision of the case made it unnecessary to consider any arguments drawn from the Treaty. Since in the *Guinness case* this Court held that the rate of exchange to be used under circumstances present in that case was the rate existing at the date of the breach of the contract to pay, and since the date of the breach of the contract in the case was December 31, 1916, several months before the date as of which the Treaty provided the rate of exchange, it is submitted that the Court in refusing to consider the Treaty provisions inferentially held them inapplicable to such a situation. Furthermore, when the *Guinness case* was in the Circuit

Court of Appeals (299 Fed. 538) that court discussed the provisions of the Treaty of Versailles and held them inapplicable to a claim under Section 9.

While in the case of *Die Deutsche Bank Filiale v. Humphrey, supra*, the Treaty provisions were not presented for consideration, nevertheless if the Treaty provisions were relevant the decision in its result was incorrect. In view of the fact, however, that the *Guinness case* was the principal case upon which the respondent relied, it seems fair to infer that this Court was not unmindful of the Treaty provisions at the time the *Die Deutsche Bank case* was decided.

It is, therefore, submitted that the provisions of the Treaty of Vienna can have no application to the present case.

#### CONCLUSION

The decree of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

WILLIAM D. MITCHELL,  
*Solicitor General.*

GEORGE R. FARNUM,  
*Assistant Attorney General.*

DEAN HILL STANLEY,  
*Special Assistant to the  
Attorney General.*

FEBRUARY, 1927.

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# SUPREME COURT OF THE UNITED STATES.

No. 180.—OCTOBER TERM, 1926.

Leopold Zimmermann, Louis J. Rees, et al.,  
Copartners doing business under the  
firm name of Zimmermann & Forshay.

*vs.*

Howard Sutherland, Alien Property Custodian of the United States; Frank White, Treasurer of the United States, and the Wiener Bank-Verein of Vienna, Austria.

Appeal from the United States Circuit Court of Appeals for the Second Circuit.

[May 16, 1927.]

Mr. Justice HOLMES delivered the opinion of the Court.

This is a suit to reach and apply property in the hands of the Alien Property Custodian or the Treasurer of the United States, seized as property of the Wiener Bank-Verein, as allowed by the amendment of The Trading with the Enemy Act of June 5, 1920, c. 241; 41 Stat. 977. The appellants were the plaintiffs. Before the late war they were depositors in the Wiener Bank-Verein, and on April 6, 1917, had on deposit 2,063,799.03 kronen. The war intervened and after the cessation of hostilities the plaintiffs demanded the amount of said kronen on deposit as of April 6, 1917, at the average call rate of exchange for the month preceding the outbreak of war between the United States and Austria Hungary, viz., 11.18 United States cents for each Austrian krone. The General Civil Law of Austria, § 1425, provided that if a debt could not be paid because of dissatisfaction with the offer or other important reasons the debtor might deposit in court the subject matter in dispute, and that if legally carried out and if the creditor was informed, this measure should discharge the debtor and place the subject matter delivered at the risk of the creditor. The creditor not being satisfied with what the Bank was willing to do the Bank, on April 1, 1920, deposited the amount stated to be due in the proper

court, with interest at  $2\frac{1}{2}$  per cent., and notified the plaintiffs. It relies upon the deposit as a defence, and the Circuit Court of Appeals held it to be one, 7 Fed. (2d) 443, overruling the decision of the District Court which allowed a recovery at the rate of exchange on August 12, 1919, on the ground that the plaintiffs showed that they wanted their money, although they made no adequate demand, on that day. 2 F. (2d) 629.

The decision of the Circuit Court of Appeals was right and in view of the recent case of *Deutsche Bank Filiale Nurnberg v. Humphrey*, November 23, 1926, does not need extended reasoning. Here as there the debt was due and payable in the foreign country. The only primary obligation was that created by the law of Austria-Hungary and if by reason of an attachment of property or otherwise the courts of the United States also gave a remedy the only thing that they could do with justice was to enforce the obligation as it stood, not to substitute something else that seemed to them about fair. The distinction between the *Deutsche Bank* case and *Hicks v. Guinness*, 269 U. S. 71, is not, as argued, that the plaintiff in *Hicks v. Guinness* was in the United States, but that, as the Court understood the facts, the debt was payable in New York and subject to American law, so that upon a breach of the contract there arose a present liability in dollars. As the present debt was governed wholly by the law of Austria-Hungary on April 1, 1920, when the deposit was made, it was discharged by the deposit which was substituted as the only object of the creditor's claim. An elaborate argument is made that the original contract between the parties was dissolved by the war. Such considerations are immaterial when it is realized that in any view of all that had happened the only obligations of the Wiener Bank-Verein were those imposed by the law of Austria-Hungary, and that if that law discharged the debt the debt was discharged everywhere.

The plaintiffs argue that they have rights under the Treaty of August 24, 1921, between the United States and Austria. But the short answer is that their rights against the Bank were ended before that treaty was made. They also urge that this is a suit under The Trading with the Enemy Act. But so was *Deutsche Bank v. Humphrey*. That Act did not turn the Austrian into an American debt and impose a new and different obligation upon the Austrian Bank.

*Decree affirmed.*